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Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools

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WILLFUL COLORBLINDNESS: THE NEW RACIAL PIETY AND THE RESEGREGATION OF PUBLIC SCHOOLS

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Some have argued for an unqualified extension of "colorblindness" to every legal setting. Three recent decisions within the Fourth Circuit appear to have accepted this absolutist position, forbidding public school boards from any consideration of race or ethnicity in making future student assignments to public schools—unless the boards are acting remedially to comply with judicial desegregation decrees. This Article examines the constitutional authority for these novel holdings. It concludes that the Fourth Circuit's new and inflexible extension of "colorblind" jurisprudence to the public school context is not warranted—either by the Supreme Court's specific holdings or by its belief in the necessity for strict judicial scrutiny of all racial classifications. To the contrary, the Article suggests that the Court has previously intimated that diversity in educational settings is one goal sufficiently compelling to survive strict judicial scrutiny, and that race-conscious student assignments should constitute acceptable means toward that end, at least in those schools where admission is not merit-based.

The Article observes that because of the continued national pattern of residential segregation by race, the Fourth Circuit's decisions invite a new era of de facto school segregation—a development that would be deeply injurious to the long-term interests of a nation presently growing more racially and ethnically diverse. The Article examines several possible responses that might be available to public school boards wishing to minimize the educational and social damage inflicted by the Fourth Circuit's decisions.

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INTRODUCTION

In the closing months of the twentieth century, federal courts within the Fourth Circuit rendered three decisions that could

mandate greater social change in public schools than any judicial actions taken in the past thirty years. Two of the three decisions emerged from the United States Court of Appeals for the Fourth Circuit itself—*Tuttle v. Arlington County School Board*[1] and *Eisenberg v. Montgomery County Public Schools*[2]—while a federal district court in Charlotte, North Carolina rendered the third—*Capacchione v. Charlotte-Mecklenburg Schools*.[3] For different reasons, each of these cases forbids school boards from using race or ethnicity as a factor in assigning students to public elementary and secondary schools, even when these elected school officials deeply believe, based upon sound social scientific evidence, that a racially diverse student body is educationally useful and socially desirable.

These three decisions call into question hundreds of public student assignment plans, most of which have been crafted carefully over the past thirty years by school boards and superintendents, with the input of thousands of interested parents and teachers, under the authority of leading Supreme Court decisions, federal executive guidelines, and state directives. In the wake of *Tuttle*, *Eisenberg*, and *Capacchione*, this entire body of legal precedents and multilateral agreements stands at risk.[4]

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1. 195 F.3d 698 (4th Cir. 1999) (per curiam), *cert. dismissed*, 120 S. Ct. 1552 (2000).

2. 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000).

3. 57 F. Supp. 2d 228 (W.D.N.C. 1999); *see also* Capacchione v. Charlotte-Mecklenburg Sch., 190 F.R.D. 170, 172 (W.D.N.C. 1999) (noting that separate notices of appeal were filed by a class of minority school children on October 7, 1999 and by the Charlotte-Mecklenburg School Board on October 8, 1999). Although the case was known as *Capacchione* throughout the proceedings in the district court, the lead party on appeal has changed, and the case is now known as *Belk v. Charlotte-Mecklenburg Board of Education*. *See, e.g.*, Belk v. Charlotte-Mecklenburg Bd. of Educ., 211 F.3d 853 (4th Cir. 2000); Brief of Plaintiffs-Appellants (Corrected), *Belk* (4th Cir. filed Feb. 1, 2000) (Nos. 99-2389, 99-2391).

4. Although District Judge Potter refused to stay the imposition of his comprehensive order in the Charlotte-Mecklenburg case for even one school year pending appeal, until the inception of the 2001–2002 academic year, *see Capacchione*, 190 F.R.D. at 175, a panel of the Fourth Circuit later granted a stay pending appeal. *See* Belk v. Charlotte-Mecklenburg Bd. of Educ., No. 99-2389(L), 1999 U.S. App. LEXIS 34574, at *8 (4th Cir. Dec. 30, 1999).

An unusual public debate subsequently broke out among judges of the Fourth Circuit over whether to allow the circuit panel to hear the appeal in the normal course, or whether to bypass panel consideration and hear the case initially en banc. *See Belk*, 211 F.3d at 854–56 (2000) (declining to hear the case initially en banc). Chief Judge Wilkerson wrote an opinion concurring in the denial, expressing "a commitment to the orderly and customary procedure of the court." *Id.* at 854 (Wilkinson, C.J., concurring in the denial of an initial hearing en banc). In a strong dissent, Judge Luttig contended that the panel's grant of a stay pending appeal seemed predicated, at least in part, on its view that the school board and the minority plaintiffs would likely succeed on the merits of their appeals, *see id.* at 857 (Luttig, J., dissenting from denial of hearing en banc), which would

The handiwork of these courts reflects a new form of racial piety, a dubious offshoot (call it a heresy) from the orthodoxy fashioned by the Supreme Court during its twenty-five-year struggle with affirmative action policies. The emerging heresy is characterized by an implicit claim to moral innocence and an unreflective formal devotion to "colorblind justice" in every setting. In the limited context in which the Supreme Court's orthodoxy first arose—the distribution of scarce public resources—its originators believed themselves to have charted a difficult but needed path across the nation's perpetual racial divide. Colorblind justice, the Supreme Court insists, is the fairest way to mediate certain widely shared public values that clash sharply when victims of racial subordination seek legal preferences in redress for America's undeniable history of racial and ethnic injustice. How better to reconcile clashing values, including (1) claims of equity versus our national commitment to merit and excellence, (2) the sense of group injury versus our commitment to individual rights, and (3) the sins of the past versus our collective aspirations for the future, than by beginning, without further delay, to treat everyone as if race were irrelevant?

The Supreme Court's present embrace of this view, led by Justice O'Connor, demands a deep "skepticism"[5] of all racial classifications, a skepticism that manifests itself through insistence upon "strict judicial scrutiny" of any state or federal actions that purport to classify people by race or ethnicity. Recent decisions of the Supreme Court have applied this skeptical orthodoxy to a discrete range of problems—principally disputes over public contracting,[6] public employment,[7] competitive admission to graduate and professional schools,[8] and the redistricting of state and federal voting districts[9]—almost all of which involved racially diverse competitors for limited public favors or

render later en banc consideration of that decision probable, with attendant and undesirable delay in implementing Judge Potter's injunction. *See id.* at 858–60 (Luttig, J., dissenting from denial of hearing en banc).

5. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223 (1995).

6. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476–77 (1989) (awarding of municipal construction contracts); *Adarand*, 515 U.S. at 204 (awarding of federal construction contracts).

7. *See* United States v. Paradise, 480 U.S. 149, 153 (1987) (hiring of state troopers); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269–70 (1986) (layoffs of public school teachers).

8. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978) (admission to medical school); *see also* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (admission to law school).

9. *See* Shaw v. Hunt, 517 U.S. 899, 901–02 (1998); Miller v. Johnson, 515 U.S. 900, 903–05 (1995); Shaw v. Reno, 509 U.S. 630, 633 (1993).

rewards. In its application of skeptical strict scrutiny principles to these problems, however, the Supreme Court has repeatedly cautioned against too categorical or unsparing an application of its colorblind approach, stressing that strict judicial scrutiny does not invariably forbid state actors to abandon all considerations of race.[10]

Nonetheless, a number of legal scholars,[11] public advocates,[12] and

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10. *See infra* notes 177–81 and accompanying text.

11. *See, e.g.*, ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1975) ("[T]he exclusion on racial grounds ... offends the Constitution and not the particular skin color of the person excluded. The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of democratic society ...."); TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 201 (1996) ("The best protection for every individual ... is to be found in law that does not give effect to any racial views ...."); RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION at ix (1996) ("The thesis of this book is that affirmative action, a well intentioned but flawed instrument of public policy ... should be revamped so that preferences ... are provided on the basis of class, not race or gender."); Glenn C. Loury, *Performing Without a Net, in* THE AFFIRMATIVE ACTION DEBATE 49, 59 (George E. Curry ed., 1996) ("I am also convinced that racial preferences in hiring, educational opportunities and contracting do not provide a solution for this problem."); Charles Murray, *Affirmative Racism*, THE NEW REPUBLIC, Dec. 31, 1984, *reprinted in* DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY AND THE POLITICS OF INCLUSION 191 (Nicolaus Mills ed., 1994) ("I was ... arguing that preferential treatment of blacks was immoral."); Richard Posner, *The DeFunis Case: The Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25 (1974) ("I contend, in short, that the proper constitutional principle is not 'invidious' racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits and burdens."); Antonin Scalia, *The Disease As Cure: "In order to get beyond racism, we must first take account of race,"* 1979 WASH. U. L.Q. 147, 156 (1979) ("I am ... opposed to racial affirmative action for such reasons of both principle and practicality."); William Van Alstyne, *Rites of Passage: Race, the Supreme Court and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979) ("We shall not now see racism disappear by employing its own ways of classifying people and of measuring their rights. Rather one gets beyond racism ... by a complete, resolute and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race.") (emphasis in original).

12. Among the legal groups to target all use of race or ethnicity by public educational institutions are the Center for Individual Rights (CIR) and the Institute for Justice. The CIR has crafted a litigation campaign to challenge any use of race. *See* Center for Individual Rights, *Civil Rights Principles and Objectives* (visited Sept. 1, 2000) <http://www.cir-usa.org/cr-aa.htm> (proclaiming its legal advocacy in opposition to racial preferences in student admissions). *See generally Beachhead for Conservatism*, NAT'L L.J., Dec. 27, 1999, at A11 (naming the CIR as "runners-up" for lawyers of the year and explaining that while "[s]everal conservative groups are fighting similar battles—the Institute for Justice and the Washington Legal Foundation, among others— ... CIR has been especially effective, carefully selecting both its battles and the circuits they fight them in, with an eye to victory").

The Institute for Justice, which describes itself alternatively as "our nation's only libertarian public interest law firm," Institute of Justice, *Profile* (visited Aug. 3, 2000)

lawyers[13] have dismissed the Court's cautionary warnings and worked with zeal and some success to secure unqualified legislative and judicial commitment to colorblindness as an unvarying rule.[14] Whatever the wisdom of the Court's original choice (and it has been widely questioned),[15] the present expansion, represented most

<http://www.ij.org/profile/index.html>, and as a "merry band of litigators," John E. Kramer, *IJ's Merry Band of Litigators* (visited Sept. 1, 2000) <http://www.ij.org/merry_band/index.html>, identifies opposition to racial preferences as one of six legal areas of focus. Its work to date seems directed more toward the active support of citizen initiatives or referenda, in states such as California and Washington, to ban all race-conscious governmental actions, than toward participation in litigation. *See* Institute for Justice, *Legal Cases* (visited Sept. 1, 2000) <http://www.ij.org/cases/index.html>.

13. A number of skillful attorneys have appeared in many of the recent spate of lawsuits challenging the use of racial considerations by school districts and state institutions of higher education. For example, A. Lee Parks has served as counsel in the following cases in addition to *Capacchione* (when he represented the white intervenor parents): *United States v. Georgia*, 171 F.3d 1344 (11th Cir. 1999) (arguing that the Troup County School District had achieved unitary status); *Tracy v. Board of Regents*, 59 F. Supp. 2d 1314 (S.D. Ga. 1999), *vacated*, 208 F.3d 1313 (11th Cir. 2000) (per curiam) (challenging the University of Georgia's affirmative action admission policies and alleging that white applicants were discriminated against based on their race); *Wooden v. Board of Regents*, 32 F. Supp. 2d 1370 (S.D. Ga. 1999) (challenging the University's affirmative action admission policies and the policies affecting historically black institutions). Mr. Parks also has served as counsel in cases representing white voters who challenged alleged racial gerrymandering. *See* Abrams v. Johnson, 521 U.S. 74 (1997); Miller v. Johnson, 515 U.S. 900 (1995); Clark v. Putnam County, 168 F.3d 458 (11th Cir. 1999).

14. *Compare* Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738, 741 (2d Cir. 2000) (vacating a district court injunction that had forbidden a school board's use of race-conscious assignment policies as a violation of the Equal Protection Clause and remanding for a full trial on whether the goal of reducing racial isolation constitutes a sufficiently compelling interest under Second Circuit precedent to justify race-conscious assignments to public schools), Hunter v. Regents of Univ. of Cal., 190 F.3d 1061, 1067 (9th Cir. 1999) (upholding race-conscious selection of elementary students for admission to university-based, research-oriented public school), *and* San Francisco NAACP v. San Francisco Unified Sch. Dist., 59 F. Supp. 2d 1021, 1039 (N.D. Cal. 1999) (tentatively approving a settlement that allows consideration of race and/or ethnicity as one factor in a student assignment program), *with* Wessmann v. Gittens, 160 F.3d 790, 808 (1st Cir. 1998) (invalidating race-conscious admissions to a public school that admitted most students based on competitive examinations); Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 382 (W.D. Ky. 2000) (dissolving the 25-year-old school desegregation decree in the Jefferson County school case and enjoining further use of race-conscious admissions criteria for a special magnet high school that operated to exclude African-American students from those programs).

15. Scholars who have criticized *Croson* include the following: Alexander Aleinikoff, *A Case For Race-Consciousness*, 91 COLUM. L. REV. 1060, 1104 (1991) (faulting *Croson*'s majority opinion on four factors); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 50 (1991) (arguing that affirmative action programs such as the city of Richmond's do not merit heightened scrutiny); Michael Rosenfeld, *Decoding* Richmond*: Affirmative Action and the Elusive Meaning of Constitutionality*, 87 MICH. L. REV. 1729, 1791 (1989) ("From the standpoint of the constitutionalization of formal means-regarding equality of opportunity, Justice O'Connor's overly narrow compensatory approach in *Croson*—and, for that matter, Justice Scalia's—is even more fundamentally

prominently by *Tuttle*, *Eisenberg*, and *Capacchione*, rests on little better than an unexamined legal faith.

In this Article, I carefully analyze these three decisions and briefly assess their implications for other school districts throughout the Fourth Circuit. I suggest that *Tuttle*, *Eisenberg*, and *Capacchione* are poorly reasoned, legally unsound, and constitutionally misguided exercises in judicial craft. Indeed, they flirt with judicial insubordination, dismissing without serious consideration, without even the courtesy of a distinguishing explanation, a constitutional consensus first articulated by a unanimous Supreme Court in 1971,[16] one since embraced by at least six Justices,[17] and most importantly,

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flawed."); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 396 (1989) ("O'Connor's opinion splinters the court, is hard to follow, and is unclear as to her holding on the question of affirmative action."); David Strauss, *Affirmative Action and the Public Interest*, 1996 SUP. CT. REV. 1, 12 (1996) ("[T]he general notion of consistency used in *Adarand* and *Croson* would lead to implausible, even bizarre conclusions."); Note, *Leading Cases*, 103 HARV. L. REV. 137, 218 (1989) (noting that "the Court's language reflects assumptions about the purpose of the equal protection clause and the nature of racism that stem from a formally appealing but substantively flawed conception of an already color-blind society"). Similarly, scholars who later criticized *Adarand* include the following: Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1784 (1996) (criticizing the Supreme Court's narrow tailoring approach in *Adarand* and *Croson* on two grounds, and suggesting instead that race can be a compelling interest which does not need to satisfy the narrow tailoring test); Neil Devins, Adarand Constructors, Inc. v. Pena *and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673, 677 (1996) ("*Adarand*'s mixed message makes it a rather slippery precedent. Moreover, because the Court remanded the case rather than resolving the dispute, *Adarand* offers little guidance about the application of strict scrutiny review."); Elaine Jones, *Race and the Supreme Court's 1994-1995 Term*, *in* THE AFFIRMATIVE ACTION DEBATE, supra note 11, at 146, 151 ("The troubling aspect about *Adarand* is the enormous effort that will now have to be spent litigating these cases . . . gathering the data to confirm what Congress already knew from its own experience."); and Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1986 (1999) (reviewing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) ("But, by saying so little, *Adarand* leaves it to lawmakers to spin the decision to fit their needs. Inside the Washington, D.C. beltway, where affirmative action is entrenched, *Adarand* is of little consequence, if any at all.")); Note, *Leading Cases*, 109 HARV. L. REV. 111, 156–57 (1995) ("The *Adarand* majority's bare mention of Section 5 highlights the fact that the Court was unable to rebut cogently the argument that the text of Section 5 allows for both 'incongruence' and 'inconsistency.' ").

16. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (observing that a school board decision that "each school should have a prescribed ratio of Negro to white students . . . as an educational policy is within the broad discretionary powers of school authorities").

17. The six Justices who recognize the constitutionality of race-conscious state action for educational diversity, broadcasting diversity, and other non-remedial purposes include Justices Brennan, White, Marshall, and Blackmun, *see Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978) ("Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admission programs where there is a sound basis for concluding that minority

one that has been relied and acted upon, with ample justification, by school officials at national, state, and local levels.

Beyond their intellectual harm, I suggest that these decisions threaten disastrous real-world consequences for millions of students throughout the Fourth Circuit. Despite their formal commitment to racial fairness, these cases will, unless modified, almost certainly operate with breathless efficiency and disturbing speed to impel widespread racial resegregation, to promote racial and socioeconomic isolation, and, consequently, to perpetuate racial subordination.

The crucial link between this new piety of colorblindness and those dire educational and social consequences lies in residential segregation, a social reality which even the colorblind can surely see. Although some school boards may turn to creative alternatives,[18] if race or ethnicity no longer can be taken into account, then most boards will experience strong political and social pressures to return to neighborhood schools, that is, to assign students based upon their neighborhood of residence. And throughout the Fourth Circuit, as in the nation at large, most of those neighborhoods are currently, and

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underrepresentation is substantial and chronic . . . ."), Justice Powell, *see id.* at 311 ("This [referring to the attainment of a diverse student body] clearly is a constitutionally permissible goal."), and Justice Stevens, who joined in the majority opinion in *Metro Broadcasting* along with Justices Brennan, Marshall, and Blackmun. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 601–02 (1990) ("The public interest in broadcasting diversity—like the interest in an integrated police force, diversity in the composition of school faculty, or diversity in the student body of a professional school—is in my view unquestionably legitimate."), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); *see also* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474 (1982) (Justices Blackmun, Brennan, White, Marshall, and Stevens, agreeing that "in the absence of a constitutional violation, the desirability and efficacy of [voluntary] school desegregation are matters to be resolved through the political process"). Then-Justice Rehnquist formerly acknowledged a state's authority to employ race-conscious policies in making student school and busing assignments. *See* Bustop, Inc. v. Board of Educ., 439 U.S. 1380, 1383 (1978) ("While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by the Constitution to take such action [referring to assigning and busing children on a race-conscious basis].").

18. *See infra* Part IV; *see also* Elizabeth Jean Bower, Note, *Answering the Call: Wake County's Commitment to Diversity in Education*, 78 N.C. L. REV. 2026, 2036–38 (2000) (providing a careful examination of Wake County, North Carolina's new student assignment policy). The Wake County School Board has responded to the *Tuttle* and *Eisenberg* decisions by abandoning race and ethnicity in favor of socioeconomic status and student achievement as relevant factors in making students assignments to its schools. *See* Todd Silberman, *School Plan Adopted*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 11, 2000, at 1A (describing the Wake County plan, which relies on both student test scores and parental income levels to assign school children to Wake County schools); *see also* Ben Wildavsky, *A Question of Black and White*, U.S. NEWS & WORLD REP., Apr. 10, 2000, at 26, 26–27 (noting the Wake County plan uses socioeconomic factors and academic achievement in lieu of race).

long have been, segregated by race and to a lesser extent by socioeconomic class.[19]

Nor is the underlying explanation for these housing patterns mysterious. White citizens have for more than a century enforced housing segregation by race—in my grandfather's time, through statutes,[20] social customs, and extra-legal methods such as intimidation, arson, bombing, or lynching[21]—and in more recent decades, through a remarkable combination of hostile or indifferent federal and state governmental policies augmented by massive private marketplace discrimination.[22] To be sure, both private housing

19. *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 61–88 & tbls.3.1, 3.3 & 3.4 (1993) (describing and documenting the persistence of residential segregation and "hypersegregation" in major metropolitan areas in every geographical region of the United States in 1970 and 1980); REYNOLDS FARLEY & WILLIAM H. FREY, LATINO, ASIAN, AND BLACK SEGREGATION IN MUTLI-ETHNIC METOR AREAS: FINDINGS FROM THE 1990 CENSUS, POPULATING STUDIES CENTER RESEARCH REPORT NO. 93-278 (Ann Arbor: Univ. of Mich. 1994) (documenting a slight overall decline in average residential segregation from 1980 to 1990, measured by the widely-used "dissimilarity index," from 78.8 to 74.5); *see also* Gary Orfield, *Segregated Housing and School Resegregation*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 291, 291–300 (Gary Orfield & Susan E. Eaton eds., 1996) [hereinafter DISMANTLING DESEGREGATION] (examining the close relationship between housing segregation and the educational isolation of minority students, as well as federal judicial reluctance to acknowledge either this relationship or the history of extensive governmental complicity in the perpetuation of segregated housing); John Yinger, *Housing Discrimination is Still Worth Worrying About*, 9 HOUSING POL'Y DEBATE 893, 910–11 (1998) (noting that the declines reported by Farley and others after the 1990 census are "modest," and insisting that "[t]he degree of [residential] segregation between blacks and whites, by any measure, remains far above the degree observed between any other two large groups," which rarely exceed 30 on the dissimilarity index among any European ethnic group).

20. *See generally* CHARLES MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 138–62 (1940) (exhaustively documenting the "segregation ordinances," statutes, and other legal devices that were regularly used to enforce residential segregation). Mangum explains that "[s]outhern white people [were] averse to living in close proximity to Negroes unless the latter [were] their servants." *Id.* at 138. He further notes that there was "a tacit understanding in the South that no Negroes [were] permitted to own property or reside in white districts" and adds that "segregation ordinances," restrictive covenants, and other legal devices were developed since "whites desire[d] a more certain way of accomplishing their purpose." *Id.* at 147.

21. *See generally* 2 GUNNER MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 622–27 (Pantheon Books 1962) (1944) (describing extra-legal methods used to maintain residential segregation, including bombing); ELLIOTT RUDWICK, RACE RIOT AT EAST ST. LOUIS JULY 2, 1917 (1964) (offering a detailed account of violent white resistance in response to African-American migration into one urban center); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 100–02, 118–19 (Bantom Books 1968) (recounting the use of violence by whites resisting residential integration).

22. *See generally* CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF

choices and economics also play a role in current housing patterns,[23] but the best evidence remains that racial prejudice and active discrimination by whites have forced residential segregation upon many African-Americans, and to a lesser extent on Latinos and Asian Americans as well.

Federal courts that would forbid school boards from considering race in school assignments cannot plausibly claim to be unaware of these all-but-inevitable social consequences that will follow in the wake of their unorthodox decisions. Nor, as I argue below, can they claim that their decisions are required by either Supreme Court precedent or the underlying constitutional concerns that motivated those prior cases.[24] Therefore, the courts must take full responsibility for commanding school boards to abandon what, with all their difficulties and disappointments, have been the most effective means for knitting together our increasingly heterogeneous society—racially and ethnically diverse public schools.[25] Their judicial handiwork

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DISCRIMINATION IN AMERICA (Michael Fix & Raymond J. Struyk eds., 1993) (evaluating careful studies of 25 metropolitan areas, commissioned by the U.S. Department of Housing and Urban Development and carried out in 1989, that found "[o]n average, blacks encountered unfavorable treatment 46 percent of the time when renting a home and 50 percent of the time when trying to purchase one"); MASSEY & DENTON, *supra* note 19, at 17–59 (chronicling policies by the Federal Housing Administration, the Home Owners' Loan Corporation, the Veterans Administration, the Federal Highway Administration, and other federal and state agencies that deliberately have created and perpetuated segregated neighborhoods since 1900); CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959) (exploring the widespread use of restrictive real estate covenants as a method of excluding African-Americans and other minorities from "white" neighborhoods); J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*, THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 140–45, 223–28, 238–42 (1979) (examining the causes of housing segregation, including decades of discrimination by federal and local governmental agencies and by private organizations, and explaining the inevitable relationship between housing policies and school composition); James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547 (1979) (documenting the legal and social forces that combined to segregate many of the nation's residential neighborhoods).

23. Ongoing research has documented, however, that a majority of African-Americans would prefer to live in racially integrated neighborhoods if they could avoid violence or neighborhood hostility. *See* John Charles Boger, *Toward Ending Residential Segregation*, *in* RACE, POVERTY, AND AMERICAN CITIES 389, 391 & n.14 (John Charles Boger & Judith Welch Wegner eds., 1996) (noting four such studies).

24. *See infra* notes 163–222 and accompanying text.

25. *See generally* Charles T. Clotfelter, *Public School Segregation in Metropolitan Areas*, 75 LAND ECON. 487, 487 (1999) (observing that "school desegregation is arguably the most important policy of American government to encourage racial integration"); Gary Orfield, *Unexpected Costs and Uncertain Gains of Dismantling Desegregation*, *in* DISMANTLING DESEGREGATION, *supra* note 19, at 73 (reviewing both the positive

opens a disturbing and reactionary chapter in the long history of American judicial involvement with issues of race and social justice.

This Article has four parts. In Part I, I will briefly review the historical role that race has played in public school assignment policies. In order fully to appreciate the three recent decisions in *Tuttle*, *Eisenberg*, and *Capacchione* and the educational changes they initiate, we must weigh the extent to which they move public schools backward, toward the era of racial separation. My brief historical account reviews three prior eras in Southern school desegregation and suggests that we now appear to be moving into a new and malignant fourth era.[26]

The first era comprises the long generations stretching backward from 1954, during which many states by law or constitutional provision, and many more by practice, deliberately segregated their schools to separate and isolate African-American children (and to a lesser extent Asian Americans) from the white majority. The second era lasted fewer than two generations, from 1954 through the late 1980s, when federal courts authored constitutional precedents (and federal executive and legislative authorities promulgated affirmative policies) designed to end the widespread regime of mandatory, legally enforced school segregation. Although many school districts moved with glacial slowness until 1968, eventually thousands of districts experienced meaningful racial desegregation for the first time in their history. The third era began in the late 1980s, when lower federal courts and eventually the Supreme Court began to elaborate a law of "unitary status," clarifying the circumstances under which school districts could free themselves of federal judicial supervision and return to local control of student assignment and other policies.

In Part II, the discussion turns from the past to the present, first taking up *Capacchione*, the recent federal district court decision addressing the Charlotte-Mecklenburg school system. The district court's decision actually resolves two originally separate cases that were consolidated for trial in 1998. The first is the thirty-five year-old

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benefits of school integration and the unrecognized costs of resegregation); William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, *in* RACE, POVERTY, AND AMERICAN CITIES, *supra* note 23, at 463, 463–70 (reviewing evidence on the positive educational benefits of desegregation).

26. Of course, any attempt to divide the seamless web of the past into discrete eras invites distortions. In his comprehensive book on school desegregation from 1954 through 1970, then-Professor J. Harvie Wilkinson plausibly identified "four successive stages" measured by the degree of Southern compliance and effective desegregation: absolute defiance (1955–1959), token compliance (1959–1964), modest integration (1964–1968), and massive integration (1968–1972). WILKINSON, *supra* note 22, at 78.

school desegregation case long known as *Swann v. Charlotte-Mecklenburg Board of Education*.[27] (For purposes of clarity, I will refer to that case, in its present iteration, as *Swann '99*, to a second case, brought by an aggrieved white parent in 1997, as *Capacchione '97*, and to the joint opinion eventually rendered after the two cases were consolidated by the district court for trial, as *Capacchione '99*.) In resolving *Swann '99*, the district court held that the Charlotte-Mecklenburg school district, which since 1965 had operated under a federal desegregation decree, had finally become "unitary," requiring the termination of federal judicial supervision.[28] Although the "unitary status" holding in *Swann '99* is not free from doubt and has been strongly contested by the plaintiffs,[29] its significance for school districts beyond the boundaries of Mecklenburg County is far less than the potential impact of *Capacchione*'s second principal holding.

That second holding, responsive to the *Capacchione '97* lawsuit, declared that the Charlotte-Mecklenburg School Board, although ostensibly "free from federal control" following the court's finding of unitary status, is actually *not* free to use its own best educational judgment in making student assignments. Instead, the district court enjoined the Charlotte-Mecklenburg board from using racial criteria in making student assignments, even if the school board believes such a course is necessary and desirable to promote racially and ethnically heterogeneous public schools.[30] I will carefully examine the body of Supreme Court precedent that appears contrary to the district court's holding as well as the handful of precedents upon which the district court itself relied. Moreover, I will assess whether the factors that have concerned the Supreme Court as it weighs race-conscious state classifications in other contexts should have equal weight when a school board considers race in assigning students to schools to further an educational interest in diversity.

The future of *Capacchione '99* as a whole might seem more

27. 243 F. Supp. 667 (W.D.N.C. 1965), *aff'd*, 369 F.2d 29 (4th Cir. 1966).

28. Capacchione v. Charlotte-Mecklenburg Sch., 57 F. Supp. 2d 228, 232 (W.D.N.C. 1999).

29. *See* Brief of Appellants Charlotte-Mecklenburg Bd. of Educ. at 13–16, Belk v. Charlotte-Mecklenburg Bd. of Educ. (4th Cir. 2000) (Nos. 99-2389, 99-2391, 00-1098) (contending that the district court made clearly erroneous factual determinations in concluding that the Charlotte district is unitary); Brief of Plaintiffs-Appellants (Corrected) at 19–48, *Belk* (4th Cir. filed Feb. 1, 2000) (Nos. 99-2389, 99-2391) (faulting the district court's factual and applied findings on numerous grounds).

30. For a perceptive analysis of *Capacchione '99* from one of the attorneys representing the original *Swann* plaintiffs, see Luke Largess, *Public School Resegregation in Charlotte*, TRIAL BRIEFS (North Carolina Academy of Trial Lawyers, Inc., Raleigh, N.C.), Nov. 1999, at 4.

uncertain on appeal had not separate panels of the Fourth Circuit rendered two decisions in the fall of 1999—*Tuttle* and *Eisenberg*—both of which reached conclusions about the permissible role of race in student assignment policies that are similar to those in *Capacchione '99* (albeit for different constitutional reasons). In Part III, I review these two complementary Fourth Circuit decisions and subject their rationale to careful analysis. I suggest that these cases ignore the most direct and pertinent body of Supreme Court jurisprudence, drawing dubious support from precedents that were fashioned in different legal and factual contexts.[31] In Part IV, I address the concerns of those pragmatists who care less about whether these decisions were rightly or wrongly decided and more about what they might require of future school boards within the Fourth Circuit.

I. THE USE OF RACE IN MAKING STUDENT ASSIGNMENTS: THE GRADUAL EVOLUTION OF CONTEMPORARY CONSTITUTIONAL STANDARDS

A. The Historical Background

For most of the nation's history, statutes unapologetically enforced racial separation in the public schools. Indeed, most Southern states criminalized attempts to teach basic reading or writing skills to African slaves.[32] Even during the Reconstruction period, when state-supported public schooling was inaugurated for both white and black children throughout the South, students were segregated by race into separate public schools because of widespread white racial bigotry.[33] Later, the Supreme Court expressly approved

31. *See generally* Note, *The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 HARV. L. REV. 940 (1999) (providing general background and commentary on these issues).

32. *See, e.g.*, JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860–1935, at 2 (1988) ("Between 1800 and 1835, most of the Southern states enacted legislation making it a crime to teach enslaved children to read or write."); JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790–1860, at 168 & n.22 (Norton Library 1971) (1943) (noting that North Carolina passed legislation in 1831 and 1832 forbidding the education of slaves).

33. Although North Carolina's Constitution of 1868, adopted during the Reconstruction period, did not formally refer to segregated schooling, even the most zealous supporters of social change at the time "recognized the depth of racial prejudice and agreed that [North Carolina's newly supported statewide public] classrooms would be segregated." PAUL D. ESCOTT, MANY EXCELLENT PEOPLE: POWER AND PRIVILEGE IN NORTH CAROLINA, 1850–1900, at 144 (1985). North Carolina and other Southern states eventually adopted either state constitutional provisions, statutes, or both, making racial segregation mandatory. *See* MANGUM, *supra* note 20, at 78–79 & n.10 (citing N.C. CONST.

systems of racially segregated, unequally funded public schooling in two important cases that followed *Plessy v. Ferguson*:[34] *Cumming v. Richmond County Board of Education*[35] in 1899 and *Gong Lum v. Rice*[36] in 1927.

The effort to overturn this system of racially segregated public schooling required a courageous and dedicated seventy-year legal struggle. It began with targeted efforts by the National Association for the Advancement of Colored People, under the leadership of Charles Hamilton Houston and Thurgood Marshall, to desegregate graduate and professional schools in the 1930s and 1940s.[37] That campaign broadened in the 1950s and 1960s into a direct assault on the whole system of state-segregated public elementary and secondary schooling—a system mandated by the statutes of Southern states and observed with no less scrupulous adherence by the segregative practices and customs of many hundreds of other school districts throughout the nation.

The Supreme Court's unanimous opinion in 1954 in *Brown v. Board of Education*[38] condemned state-enforced segregation in public education under the Equal Protection Clause of the Fourteenth

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art. IX, § 2; N.C. CODE ANN. § 5384 (Michie 1931)). But segregation was not confined to the South; segregated public schools were common throughout the North and West both prior to and following the Civil War. *See* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860, at 113–52 (1961); MANGUM, *supra* note 20, at 79–83. For example, even in Massachusetts, perhaps the northern state most celebrated for its racial tolerance, the Massachusetts Supreme Judicial Court upheld racially segregated public schools in 1849 in *Roberts v. City of Boston*, 59 Mass. (1 Cush.) 198, 209–10 (1849). The Massachusetts legislature eventually enacted a statute in 1855 that prohibited racial or religious distinctions in admitting students to Massachusetts's schools. *See* LITWACK, *supra*, at 148–49.

34. 163 U.S. 537 (1896).

35. 175 U.S. 528, 545 (1899) (permitting the Richmond County, Georgia School Board to continue providing tax support for a whites-only high school while simultaneously withdrawing financial support for the district's separate, blacks-only high school).

36. 275 U.S. 78, 87 (1927) (rejecting an Equal Protection Clause claim brought by Asian American parents whose child was refused admittance to Mississippi's public schools for white children and was assigned to "colored" schools).

37. *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976) (describing the NAACP's campaign); GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983) (exploring Charles Houston's role in developing the legal strategy that led to *Brown*); MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 116–86 (1994) (recounting Marshall's role as a legal strategist, oral advocate, and courtroom lawyer in the school desegregation campaign).

38. 347 U.S. 483 (1954); *see also* Brown v. Board of Educ. ("Brown II"), 349 U.S. 294, 300–01 (1955) (addressing the remedial responsibilities of the parties and the proper role of the lower federal courts).

Amendment.[39] The opinion rested on Chief Justice Warren's central insight that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[40] Because that basic proposition was fiercely resisted in many quarters,[41] actual desegregation of public schooling lagged woefully behind *Brown* in the formerly *de jure* states. Indeed, in 1964, only 2.25% of all African-American school children in the South attended desegregated schools.[42] Not until Congress adopted Title VI of the Civil Rights Act of 1964[43] and began threatening to withhold millions of federal dollars from still-segregated school districts did resistance to desegregation begin to abate.[44]

B. The Remedial Consideration of Race Under Green *and* Swann

By far the most effective and significant post-*Brown* judicial decisions were rendered in *Green v. County School Board*[45] in 1968 and *Swann v. Charlotte-Mecklenburg Board of Education*[46] in 1971. *Green* and *Swann* together set the parameters for all subsequent desegregation orders, clarifying the scope of school board duty, the limits of federal judicial authority, and the goals and objectives appropriate to achieve constitutionally mandated desegregation. In *Green*, the Supreme Court first imposed an "affirmative duty" upon every Southern school board that formerly operated a racially segregated school system to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[47] *Green* directed federal district judges, in overseeing the transition of these school districts to "a unitary, nonracial system of public education,"[48] to assess the racial impact of school board actions in at least the following six areas of school operations: (1) student attendance patterns, (2) faculty assignments,

39. *See Brown*, 347 U.S. at 494–95.

40. *Id.* at 495.

41. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 149–88 (3d rev. ed. 1974) (describing the campaign of massive public resistance by southern political figures and their followers).

42. *See* James R. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 44 n.9 (1967).

43. Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d, 2000d-1 to 2000d-4 (1994)).

44. *See* Gary Orfield, *Turning Back to Segregation*, *in* DISMANTLING DESEGREGATION, *supra* note 19, at 1, 7–8.

45. 391 U.S. 430 (1968).

46. 402 U.S. 1 (1971).

47. *Green*, 391 U.S. at 437–38.

48. *Id.* at 436.

(3) staff assignments, (4) transportation, (5) extra-curricular activities, and (6) school facilities.[49]

Three years later, in *Swann*, a unanimous Court authorized district courts to employ a variety of remedial tools as they oversaw the desegregation process, including: (1) express racial goals for the student population in each desegregating school; (2) express faculty and staff racial ratios; (3) administrative "pairing" of geographically dispersed neighborhoods within a school district, if necessary, to meet these student and staff desegregation goals; and (4) cross-town busing or other transportation remedies necessary to facilitate desegregation.[50] The Court expressly recognized that dismantling the former dual systems would require school boards to consider race in assigning school children and teachers to desegregated schools. Proper remediation would require an "[a]wareness of the racial composition of the whole school system," Chief Justice Burger wrote, and "limited use ... of mathematical ratios ... was within the equitable remedial discretion of the District Court."[51] Moreover, the Court added that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation [among students] and will thus necessarily be concerned with the elimination of one-race schools."[52]

The Court ratified the use of race-conscious assignment policies even more explicitly in *North Carolina State Board of Education v. Swann*,[53] a companion case decided the same day as *Swann v. Charlotte-Mecklenberg Board of Education.* In *North Carolina State Board of Education*, the Court unanimously struck down North Carolina's anti-busing law,[54] which had forbidden any assignment of school children by race.[55] Writing for the Court, Chief Justice Burger described race-conscious student assignments as an essential tool to fulfill "the promise of *Brown*" and rebuffed North Carolina's contention that the federal Constitution required "colorblind" student assignments.[56] The North Carolina legislation, Chief Justice Burger observed, "exploits an apparently neutral form to control

49. *See id.* at 435.

50. *Swann*, 402 U.S. at 22–31.

51. *Id.* at 25. Chief Justice Burger noted that the district court had set "a seventy-one percent white, twenty-nine percent black target for assignment of students to most Charlotte schools." *Id.* at 23.

52. *Id.* at 26.

53. 402 U.S. 43 (1971).

54. *See* N.C. GEN. STAT. § 115-176.1 (Supp. 1969) (repealed 1981).

55. *See North Carolina State Bd. of Educ.*, 402 U.S. at 46.

56. *Id.* at 45–46.

school assignment plans by directing that they be 'color blind.' " Moreover, to approve "colorblind" statutes, set "against the background of segregation, would render illusory the promise of *Brown*," and "deprive school authorities of the one tool absolutely essential to [the] fulfillment of their constitutional obligation to eliminate existing dual school systems."[57]

Green, *Swann*, and *North Carolina State Board of Education* conveyed the Supreme Court's unmistakable impatience with the long delay in ending school segregation that followed its 1954 *Brown* decision, a deep skepticism toward official assurances of "good faith," and a steely-eyed demand for objective, measurable *results* in the desegregation of students, faculties, administrative personnel, and other aspects of public school life. While the Court tackled important school issues outside the South,[58] *Green* and *Swann* became the touchstones of southern school desegregation litigation throughout the 1970s and 1980s. Hundreds of judicial decrees were implemented in formerly state-segregated districts, including scores in North Carolina, in reliance upon the unanimous holdings of these cases.

C. *The 1990s: Desegregation and "Unitary Status"*

After nearly two decades in which the Supreme Court rarely revisited its handiwork, a very differently constituted Court returned to Southern school desegregation in the early 1990s to address the question of "unitary status." In these new cases, the Court considered how much progress school districts must demonstrate before they may properly be found to have met their affirmative duties, achieved unitary status, and earned freedom from further federal court supervision. The Court's first substantive decision on these issues[59] came in *Board of Education of Oklahoma City Public*

57. *Id.*

58. *See* Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) (holding that a federal court lacked authority to order inter-district school segregation in a metropolitan area absent proof that the district lines were drawn for racial reasons, or that the violations in one school district caused segregation in an adjacent district); Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 208 (1973) (holding that a district-wide school desegregation decree was warranted upon proof that a school board had administered its school statutes with the intent to create or maintain racially segregated schools in a substantial portion of the system).

59. In the mid-1980s the Supreme Court denied certiorari to review a Fourth Circuit decision affirming a judgment that the schools of the City of Norfolk were "unitary" and releasing the school district from further judicial supervision. *See* Riddick v. School Bd., 784 F.2d 521, 538–39 (4th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986). *Riddick* was the first important "unitary status" case decided by a federal circuit court.

Schools v. Dowell[60] in 1991. From the outset, sharp differences in the Court's tone and emphasis were clear. No longer unanimous—indeed, sharply divided, in a five-to-three opinion authored by Chief Justice Rehnquist—the Court began by stressing that "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination."[61] Chief Justice Rehnquist added that federal desegregation decrees were not meant to operate in perpetuity, and that courts should endeavor to reinstate local control by school authorities. "[A]fter the local authorities have operated in compliance with [a desegregation decree] for a reasonable period of time," citizens should be permitted to participate in decision-making, and the school board should be free to adopt new school programs to fit local needs.[62] The Court remanded *Dowell* to the district court, directing it to consider "whether the [Oklahoma City] Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."[63]

A year later, the Court returned to the issue of unitary status in *Freeman v. Pitts*.[64] Significantly, neither *Dowell* nor *Freeman* formally repudiated the six *Green* factors or the *Swann* remedies; indeed, both cases cited the *Green* factors with apparent approval,[65] and the *Freeman* Court even accepted the district court's inclusion of a seventh factor in the calculus: "the quality of education being offered to the white and black student populations."[66] Yet the *Freeman* Court declined to agree with the civil rights plaintiffs that school boards must meet all six *Green* goals simultaneously before seeking unitary status.[67] Instead, the Court endorsed an alternative, piecemeal approach that the DeKalb County (Georgia) School Board proposed, under which district courts might end their judicial oversight of one or more *Green* factors where sufficient progress had been shown—for example, in student assignments or facilities—even if it were necessary to retain judicial oversight in another area where unexplained racial variations remained.[68] The *Freeman* Court added that this partial withdrawal of federal judicial oversight would be

60. 498 U.S. 237 (1991).
61. *Id.* at 247.
62. *Id.* at 248.
63. *Id.* at 249–50.
64. 503 U.S. 467 (1992).
65. *See Freeman*, 503 U.S. at 472–73, 485–86; *Dowell*, 498 U.S. at 250.
66. *Freeman*, 503 U.S. at 473.
67. *See id.* at 489–91.
68. *See id.* at 489–90.

constitutionally permissible even if, following a period of compliance, student populations subsequently became racially imbalanced, so long as the emerging student imbalances could not plausibly be traced to the board's former *de jure* segregation or to any intervening misconduct by the school board.[69]

To aid federal courts in evaluating requests for the partial withdrawal of judicial supervision, the *Freeman* Court directed district judges to weigh three new factors:

> [1] whether there has been full and satisfactory compliance with the [desegregation] decree in those aspects of the system where supervision is to be withdrawn; [2] whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and [3] whether the school district has demonstrated . . . its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.[70]

Read broadly, these new factors appeared to adjust both the letter and spirit of *Green* and *Swann*. For example, all three *Freeman* factors subtly shifted judicial attention from a functional concern with the real world consequences of school board actions—whether black and white children were actually attending schools together—toward a more formal concern with technical compliance. Thus, the first factor replaced *Green*'s demand for results that "work, and . . . work *now*"[71] with the more modest demand that a school board simply follow the letter of its desegregation decree. This emphasis on formal compliance was reinforced by *Freeman*'s emphasis on a school board's "good-faith commitment."[72] Under this reconception of unitary status, solemn assurances replaced concrete outcomes as a principal measure of compliance. Moreover, a crucial test of good faith, the Supreme Court had earlier suggested in *Dowell*, was "whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable."[73] In *Freeman*, the Court reinforced this new emphasis on practicability as a limit upon a school board's affirmative

69. *See id.* at 494. The Court held that imbalances brought about by the private housing choices of parents within the district did not constitute "state action" and would therefore not implicate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 495.

70. *Id.* at 491.

71. Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

72. *Freeman*, 503 U.S. at 491.

73. Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991).

duties, emphasizing that no "heroic measures must be taken to ensure racial balance in student assignments system wide."[74]

Freeman's final contribution was to stress the temporary nature of desegregation remedies. The "end purpose" of desegregation litigation, it emphasized, must be "to remedy the violation *and, in addition, to restore state and local authorities to the control of a school system,*"[75] underlining the belief that "[r]eturning schools to the control of local authorities at the earliest practicable date is essential" to reestablish the " 'vital national tradition' " of local school board autonomy.[76]

The *Freeman* factors, therefore, have provided powerful new weapons for ending desegregation lawsuits. Even if a school board's actions have not been fully effective in achieving desegregation, a district court might nonetheless conclude that they have succeeded "to the extent practicable." A district court can disregard evidence of continuing racial separation in a school district so long as it is not "traceable in a proximate way"[77] to former state misconduct but is, instead, attributable to "private choices."[78] School board assertions of "good faith" can be assigned a positive significance that *Green* had denied them. In conducting their deliberations, moreover, federal courts are charged to complete their work promptly, lift any outstanding decrees, and restore local control as soon as possible.

The Supreme Court revisited public school desegregation issues in *Missouri v. Jenkins* ("*Jenkins III*") in 1995.[79] In this case Chief Justice Rehnquist lifted the *Freeman* test from its original, narrower context—"inform[ing] the sound discretion of the [district] *court in ordering partial withdrawal,*"[80]—and gave it a central role in all cases in which defendants seek relief from further duties under a desegregation decree.[81] Collapsing *Freeman*'s three-factor test into two factors (and thus reducing the ultimate burden imposed on a

74. *Freeman*, 503 U.S. at 493.

75. *Id.* at 489 (emphasis added).

76. *Id.* at 490 (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977)).

77. *Id.* at 494.

78. *Id.* at 495.

79. 515 U.S. 70 (1995). Other aspects of the Kansas City school case, pending since 1977, had received Supreme Court review on two previous occasions. *See id.* at 74–78. In 1989, the Court upheld a grant of attorneys fees to counsel for the civil rights plaintiffs. *See* Missouri v. Jenkins ("Jenkins I"), 491 U.S. 274 (1989). In 1990, the Court held that the district court had abused its remedial discretion by unilaterally adjusting the local property tax rate to pay for court-ordered school improvements. *See* Missouri v. Jenkins ("Jenkins II"), 495 U.S. 33 (1990).

80. *Freeman*, 503 U.S. at 491 (emphasis added).

81. *See Jenkins III*, 515 U.S. at 88–89.

defendant school board), Chief Justice Rehnquist wrote that "[t]he ultimate inquiry is ' "whether the [constitutional violator] ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." ' "[82]

Further reshaping the *Freeman* test, the Chief Justice appeared to alter the traditional burdens of proof on the parties by suggesting that before a district court could order additional measures to eliminate continuing racial disparities, "it must identify 'the incremental effect' that prior *de jure* segregation had" upon the continuing vestiges under consideration.[83] "[N]umerous external factors," the Court suggested, might contribute to continuing racial disparities, but "[s]o long as these external factors are not the result of [state-ordered] segregation, they do not figure in the remedial calculus."[84] If these remarks represent a new burden of proof assigned by the Court, they constitute a significant departure from previous jurisprudence. Since the time of *Green* in 1968, the Court had placed the burden to explain such racial disparities on school boards;[85] *Freeman* expressly reaffirmed that allocation of proof as recently as 1992.[86] Yet Chief Justice Rehnquist's discussion in *Jenkins III* seemed to reverse this allocation: unless a civil rights plaintiff can demonstrate affirmatively that continuing racial disparities are traceable to prior school board actions, it may be error for a district judge to consider them.

Together, *Dowell*, *Freeman*, and *Jenkins III* have eased considerably the constitutional demands on formerly segregated school districts and have invited the new round of unitary status litigation that is presently underway, offering school districts the prospect of a speedier and more successful trip to the federal courthouse. In marked contrast to the *Green/Swann* era, judicial impatience by the late 1990s had less to do with school board delays than with ongoing civil rights litigation. The Supreme Court presently reserves its skepticism for continued judicial involvement rather than school board protestations of good faith, and its demand

82. *Id.* at 89 (quoting *Freeman*, 503 U.S. at 492 (quoting Board of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991)) (alterations in original)).

83. *Jenkins III*, 515 U.S. at 101.

84. *Id.* at 102.

85. *See* Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

86. *See Freeman*, 503 U.S. at 494 (reiterating that "[t]he school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation").

seems less for effective desegregation than for a return to local control.

D. *School Boards' Freedom to Promote Diversity Outside the Remedial Context—Earlier Precedents*

The recent *Capacchione*, *Tuttle*, and *Eisenberg* decisions, as I suggested in the Introduction, announce a sweeping new rule: school boards operating without the protection of court-ordered desegregation decrees violate the Fourteenth Amendment if they self-consciously use racial or ethnic criteria in assigning students to public schools. In this concluding portion of Part I, I examine the Supreme Court's pre-1995 precedents that addressed this specific issue.

The most prominent of these precedents is *Swann v. Charlotte-Mecklenburg Board of Education*[87] itself, in which Chief Justice Burger, writing for the Court, contrasted the *limited* authority reposed in the federal judiciary to remedy constitutional violations with the *far broader discretion* that school boards possess when they make racial assignments for pedagogical reasons:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities*; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.[88]

Subsequently, then-Justice Rehnquist, acting on an application for a stay pending certiorari in *Bustop, Inc. v. Board of Education*[89] in 1978, rejected a Fourteenth Amendment argument put forward by white parents who were unhappy with a voluntary, race-conscious student assignment plan being implemented in Los Angeles County, California.[90] He noted that their "novel" argument seemed to depend upon an assumption "that each citizen of a State who is either a parent or a schoolchild has a 'federal right' to be 'free from racial

87. 402 U.S. 1 (1971).
88. *Id.* at 16 (emphasis added).
89. 439 U.S. 1380 (1978).
90. *See id.* at 1382–83.

quotas and to be free from extensive pupil transportation.' "[91] Although Justice Rehnquist emphasized that California was under no federal constitutional obligation to undertake voluntary desegregation efforts, he wrote that he had "very little doubt that it was *permitted* . . . to take such action."[92]

A third voice recognizing the constitutional distinction between judicially required and educationally chosen uses of race in school assignment emanated from Justice Powell in *Keyes v. School District No. 1, Denver, Colorado*.[93] Even as he urged the Court to abandon all distinctions between *de jure* and *de facto* school segregation and to require every school board to integrate its schools, Justice Powell added that, beyond his proposed new constitutional duty, "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation."[94] Underscoring the need in our "pluralistic society" to teach "students of all races [to] learn to play, work, and cooperate with one another," Justice Powell insisted that his opinion in *Keyes* was not "meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."[95] In sum, Justice Powell added his voice to those of Chief Justice Burger in *Swann* and then-Justice Rehnquist in *Bustop*, expressly affirming that school boards could engage in voluntary, race-conscious student assignments for educational reasons without violating the federal Constitution.[96]

One of the most difficult and contentious issues to confront the Supreme Court during the 1970s was whether public institutions of higher education could use race as a criterion for admission to their institutions. In *Regents of the University of California v. Bakke*[97] in 1978, a disappointed applicant to the University of California at Davis Medical School challenged a policy that set aside sixteen out of one hundred seats in each entering class for applicants from certain

91. *Id.* at 1383.

92. *Id.*

93. 413 U.S. 189, 242 (1973) (Powell, J., concurring in part and dissenting in part).

94. *Id.* (Powell, J., concurring in part and dissenting in part).

95. *Id.* (Powell, J., concurring in part and dissenting in part).

96. *See also* Offermann v. Nitkowski, 378 F.2d 22, 24 (2d Cir. 1967) (holding that a school district's voluntary use of race in making school assignments to end *de facto* segregation is constitutionally permissible when "its use is to insure against, rather than to promote deprivation of equal educational opportunity"); Lee v. Nyquist, 318 F. Supp. 710, 720 (W.D.N.Y. 1970) (holding that a New York state statutory provision that forbade state officials or appointed school boards from assigning students or from altering school attendance zones in order to improve racial balance was unconstitutional), *aff'd*, 402 U.S. 935 (1971).

97. 438 U.S. 265 (1978).

minority groups.[98] In resolving this challenge, the Court fractured into three groups. The first group, a more liberal faction of four Justices, contended that "benign" uses of race (such as affirmative action to increase the number of minority students attending institutions of higher education) should be judicially reviewed under the Fourteenth Amendment applying a less exacting "intermediate" standard that would be satisfied by demonstrating that a state's use of race was "substantially related" to an "important governmental interest," such as the redress of prior "societal discrimination."[99] A second group of four more conservative Justices would not have reached the Fourteenth Amendment issues in *Bakke* at all, urging instead that any race-conscious behavior violated Title VI of the Civil Rights Act of 1964.[100]

Justice Powell's judgment for the Court drew four votes from more liberal Justices on some positions and four votes from more conservative Justices on others. While every major facet of his opinion commanded five votes, no other Justice agreed with his entire opinion. Justice Powell did reach the Fourteenth Amendment issues in *Bakke* and concluded that the state's use of race in admissions decisions required strict scrutiny by the federal courts—proof that the racial considerations were "precisely tailored" to accomplish a "compelling" state interest.[101] In addition, Justice Powell, joined by the four liberal Justices, held that the "attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education."[102] Nevertheless, he did not approve the particular use of race made by the University of California at Davis Medical School during its admissions process and reasoned that "[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[103] In sum, Justice Powell's opinion held that while achieving student diversity in higher education is a compelling state interest sufficient to survive strict scrutiny by a federal court, and while race may constitutionally be used as a "plus" factor in admissions decisions, race may not be employed as the sole

98. *See id.* at 269–75.

99. *Id.* at 361–62 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

100. *See id.* at 411–18 (Stevens, J., concurring in the judgment in part and dissenting in part). Chief Justice Burger, then-Justice Rehnquist, and Justice Stewart joined in Justice Stevens's opinion.

101. *Bakke*, 438 U.S. at 299, 305.

102. *Id.* at 311–12, 314.

103. *Id.* at 314.

factor in determining admission for seats in an entering medical school class.[104]

In subsequent years, Justice Powell's opinion in *Bakke* became a familiar guidepost for those shaping thousands of voluntary admissions policies, not only for institutions of higher education,[105] but also for elementary and secondary schools as well. The Supreme Court, fully informed of this widespread reliance upon *Bakke*, never thereafter directly renounced or sought reconsideration of that decision.

In 1982, the Supreme Court addressed a statewide initiative in the State of Washington that effectively curtailed the efforts of the Seattle School District No. 1 to engage in the voluntary, race-conscious desegregation of its public schools.[106] The school district, after recognizing that "segregated housing patterns in Seattle ha[d] created racially imbalanced schools"[107] and that its prior administrative efforts had not succeeded, formally defined "racial balance" goals and resolved to eliminate all imbalances within three years.[108] In response, a citizen group placed an initiative on the Washington State ballot for the November 1978 general election that would have required local boards to assign students to schools nearest their homes under ordinary circumstances and would have permitted busing for racial purposes only in compliance with a court order.[109]

After the initiative succeeded with Washington voters, the school district challenged its constitutionality in federal court. The Supreme Court ultimately struck down the initiative under the Equal Protection Clause, reasoning that it violated the principles of *Hunter v. Erickson*,[110] since it "remove[d] the authority to address a racial

104. *Id.* at 316–18.

105. For the application of the *Bakke* principle by colleges and universities, see WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 8 (1998) ("On the authority of Justice Powell's decisive opinion in *Bakke*, virtually all selective colleges and professional schools have continued to consider race in admitting students.") and BERNARD SCHWARTZ, BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT 154 (1988) ("A special committee appointed to analyze [New York University Law School's] admission policy in light of the *Bakke* decision reported that the policy should be guided by the Powell opinion.").

106. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

107. *Id.* at 460.

108. *Id.*

109. *See id.* at 462–63.

110. 393 U.S. 385 (1969) (invalidating, as a violation of the Equal Protection Clause, a city charter amendment that singled out ordinances to bar racial or religious discrimination in housing barring their adoption unless the ordinances received majority support from city voters at a general election).

problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests."[111] In announcing a conclusion for five members[112] of the Court, Justice Blackmun clearly assumed that no federal constitutional principle would forbid Seattle or other school districts from enacting voluntary, race-conscious student assignments. Although acknowledging that such assignments, especially when accomplished by busing for desegregation, often engendered strong public controversy,[113] Justice Blackmun held that in the absence of a constitutional violation, "the desirability and efficacy of school desegregation are matters to be resolved through the political process."[114] The Supreme Court's decision in *Washington v. Seattle School District No. 1* freed the local school board to resume its mandatory efforts to desegregate its schools by race, despite State efforts to impede the choice of the local board.

The dissenting opinion by Justice Powell did not dispute the authority of the local board under the federal constitution to engage in race-conscious assignment, but focused instead on whether federal courts should intrude on a state's decision to constrain its local school boards by restricting their student assignment policies through the political process.[115]

Thus, in nearly half a dozen decisions rendered over a twelve-year period—*Swann*, *Bustop*, *Keyes*, *Bakke*, and *Seattle School District No. 1*—the Court itself or various of its Justices gave express approval and constitutional sanction to the voluntary use of race by states or local governmental agencies to achieve ends of educational diversity.

II. THE DUAL SIGNIFICANCE OF *CAPACCHIONE V. CHARLOTTE-MECKLENBURG*

On September 9, 1999, after nearly thirty-five years of judicial oversight, the United States District Court for the Western District of North Carolina terminated a lawsuit originally filed against the Charlotte-Mecklenburg Board of Education alleging that the board had long maintained a racially segregated "dual system" of public schooling.[116] The court's decision in *Capacchione v. Charlotte-*

111. *Washington*, 458 U.S. at 474.
112. Joining Justice Blackmun were Justices Brennan, White, Marshall, and Stevens.
113. *Washington*, 458 U.S. at 473.
114. *Id.* at 474.
115. *Id.* at 488–89 (Powell, J., dissenting).
116. The Honorable Robert Potter, who presided over the combined cases and entered

Mecklenburg School Board,[117] currently on appeal to the Fourth Circuit, disposed of two separate lawsuits that the district court consolidated in 1998. The first was the long-standing school desegregation lawsuit, originally known as *Swann v. Charlotte-Mecklenburg Board of Education*,[118] the earlier history of which I reviewed in Part I above.[119] The second lawsuit (which I refer to here as *Capacchione '97*) was brought in 1997 by William Capacchione, a parent who alleged that the Charlotte school board's use of racial guidelines adversely affected his daughter's chances of admission to a magnet school. Mr. Capacchione drew upon *Croson*, *Adarand*, and several district and circuit court opinions to argue that any use of racial classifications by the school board other than to remediate its own prior discrimination violated the Equal Protection Clause.[120] The *Capacchione '97* lawsuit broadened when other white and Latino parents intervened, asserting similar claims and similar injury on behalf of their own children.[121]

The school board responded to these claims by moving to dismiss *Capacchione '97*, alleging that its race-conscious assignments were made pursuant to court orders that were sanctioned by the federal

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the order, was no stranger to the *Swann* litigation. In 1969, acting as a private attorney, Potter represented the Concerned Parents Association, a group of several thousand white parents who gathered in May of 1969 in opposition to the desegregation decrees of then-district judge James B. McMillan. The parents signed a petition, drafted by Potter, that called upon the Charlotte-Mecklenburg School Board to submit a student assignment plan in response to Judge McMillan's desegregation order that would " 'retain the freedom of any student to attend the school of his choice' " and would oppose all court-ordered busing for desegregative purposes. FRYE GAILLARD, THE DREAM LONG DEFERRED 59 (1988) (quoting the petition). The petition also urged the school board to appeal any decision of the federal court that did not observe these principles. *See id.* Potter later appeared before the board in support of the petition.

Subsequently, in 1974, Potter wrote a letter opposing James Lanning as a candidate for a state judicial position because of his involvement as a lawyer for the minority plaintiffs in *Swann*. Lanning, who later served as Chief Judge of the Mecklenburg County District Court, observed that Potter "was the only lawyer I'm aware of that raised an issue that you shouldn't be a judge if you'd worked for desegregation of the schools." Jim Morrill, *Trial Brings School Case Full Circle: Veteran Judge Will Set Tone for Future*, CHARLOTTE OBSERVER, Apr. 18, 1999, at 1A (appearing in *Deciding Desegregation: A Continuing Series*).

117. 57 F. Supp. 2d 228 (W.D.N.C. 1999).

118. 402 U.S. 1 (1971).

119. *See supra* notes 50–52 and accompanying text. The procedural history of *Swann* is set forth at length in *Capacchione*. *See Capacchione*, 57 F. Supp. 2d at 232–39.

120. *See Capacchione*, 57 F. Supp. 2d at 239–41.

121. *See id.* at 240; Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 179 F.R.D. 505, 506 (W.D.N.C. 1998) (granting leave to these additional parents to intervene in the consolidated proceedings of *Swann '99* and *Capacchione '97*).

court in *Swann*.[122] At that point, the original *Swann* plaintiffs (a group of African-American parents) quickly moved to reactivate that long-dormant lawsuit, alleging that remaining vestiges of the prior dual system still needed remedy.[123] The *Capacchione '97* plaintiffs countered that the Charlotte system had long ago achieved unitary status and that any court orders that might still permit race-conscious student assignments should be vacated and the *Swann* lawsuit dismissed.[124]

The district court, recognizing that these lawsuits shared many questions of law and fact, denied the school board's motion to dismiss *Capacchione '97*, restored *Swann* (which I earlier designed as *Swann '99*) to its active docket, and consolidated *Swann '99* and *Capacchione '97* for trial.[125] The court then permitted the *Capacchione '97* plaintiffs to intervene in *Swann '99*[126] and eventually rendered a joint opinion (which I have designated as *Capacchione '99*).[127] The first portion of that joint opinion, as noted above, held that the Charlotte system is unitary thereby dissolving all prior desegregation orders and thus dismissed the thirty-five year-old desegregation lawsuit.[128] In the companion *Capacchione '97* litigation, however, the court imposed on the newly freed Charlotte-Mecklenburg School Board a novel injunctive order, enjoining it from "any further use of race-based lotteries, preferences, and set-asides in student assignment."[129] In so ruling, the district court agreed with the *Capacchione '97* plaintiffs' contention that "in a non-remedial, unitary status setting, the use of race in the admissions process does not further a compelling governmental interest."[130]

A. The District Court's Decision to End the Swann *Litigation*

The original *Swann* plaintiffs, as indicated, entered this round of the litigation to oppose an end to the *Swann* litigation. They contended that, in a number of important respects, the Charlotte-Mecklenburg School Board had failed to fulfill its affirmative duties

122. *See Capacchione*, 57 F. Supp. 2d at 239.
123. *See id.* at 239–40.
124. *See id.* at 240.
125. *See* Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 179 F.R.D. 177, 178–79 (W.D.N.C. 1998).
126. *See* Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 179 F.R.D. 502, 504–05 (W.D.N.C. 1998) (granting leave to Capacchione to intervene in *Swann*).
127. *See Capacchione*, 57 F. Supp. 2d at 240, 293.
128. *See id.* at 232, 284.
129. *Id.* at 292.
130. *Id.* at 291.

under *Green* as well as earlier decrees issued in *Swann*.[131] In response, the defendant school board adopted what the district court termed "a bizarre posture," agreeing with the plaintiffs "that it ha[d] not complied with the Court's [prior] orders," that Charlotte-Mecklenburg retained vestiges of the old dual system, that the system was not yet unitary, and that the *Swann '99* lawsuit should therefore not be dismissed.[132] Indeed, throughout the lengthy trial in 1999,[133] the school board and the plaintiffs offered similar constitutional arguments and relied on overlapping evidence and expert witnesses.[134]

Applying the newly emerged jurisprudence of *Dowell*, *Freeman*, and *Jenkins III*, the district court conducted a unitary status analysis, assessing each of the six *Green* factors in order to determine whether the Charlotte school board had eliminated the vestiges of its formerly dual system.[135] I will not review the district court's factual findings in

131. The plaintiffs placed special emphasis on the school board's failure to respond adequately to the district court's opinion in *Martin v. Charlotte-Mecklenburg Board of Education*, 475 F. Supp. 1318 (W.D.N.C. 1979), which rejected a challenge to the original *Swann* orders brought by an earlier group of white parents and which concluded that the school board had not yet met its obligations in four discrete areas, including the siting of new schools, the location of primary schools, the monitoring of student transfer requests, and the equitable allocation of transportation burdens. *See* Brief of Plaintiffs-Appellants (Corrected) at 20–38, Belk v. Charlotte-Mecklenburg Bd. of Educ. (4th Cir. filed Feb. 1, 2000) (Nos. 99-2389, 99-2391) (detailing the board's failure to comply with the *Martin* order and faulting the district court for overlooking or disregarding them).

132. *Capacchione*, 57 F. Supp. 2d at 232.

133. The Charlotte Observer devoted extraordinary attention to the two lawsuits. For an extensive collection of articles that profile the parties, their lawyers, the district judge, and the day-by-day testimony during the three-month trial, see Charlotte Observer, *Deciding Desegregation: A Continuing Series* (visited Sept. 1, 2000) <http://www.charlotte.com/observer/special/deseg/>.

134. The district court alleged that this stance stemmed from an invidious underlying motivation: "[the Charlotte school board] now wishes to use [the prior *Swann*] order as a pretext to pursue race-conscious, diversity-enhancing policies in perpetuity." *Capacchione*, 57 F. Supp. 2d at 232.

135. *See id.* at 242–85. The court's detailed analysis is instructive on the application of desegregation standards that other plaintiffs and school boards are likely to face in unitary status litigation in the new millennium. For example, in *Cappachione*, the court explored in considerable detail the myriad changes in student assignments since 1971 to assess whether the vestiges of the old, racially dual assignment system remain. The complexities evaluated by the court included the following: (1) at least 15 separate court orders over time that touched upon student assignments issues, not all of them fully consistent (thereby raising an issue of what benchmark orders the court should use in evaluating the board's "good faith compliance"); (2) a bewildering array of year-by-year variations in the racial composition of each of the elementary and secondary schools over a 30-year period; (3) the impact of different, interactive demographic trends on assignment patterns, including strong overall population growth in Mecklenburg County, the development of many predominantly white residential areas in the northern and southern extremes of the county, and the disproportionate growth of the black student population in the 1970s and

detail, except to note the fundamental disagreement between the *Swann '99* plaintiffs and the Charlotte board on the one hand, and the *Capacchione '99* parties (and the district court itself) on the other, over the import of much of the evidence presented at trial. The *Swann '99* plaintiffs urged that the school board had long failed to take various steps, contemplated by an earlier court order in the *Swann* case,[136] that would have led to greater student desegregation, and they noted that a trend toward growing racial imbalances throughout the 1990s.[137] The Charlotte school board agreed and, one week before trial, presented the district court with a new " 'controlled choice' " plan which, it argued, had great promise to reduce the growing imbalance and bring about further student desegregation.[138]

The district court found the *Swann '99* plaintiffs' arguments substantially weakened by their failure to request any modifications of the court's student assignment orders between 1975 and 1998 (when the *Capacchione '97* plaintiffs first sought to declare the district "unitary").[139] The district court also relied on *Freeman v. Pitts*[140] to dismiss the school board's argument that still further student desegregation was possible in the Charlotte system. According to the court, the school board's argument was "premised on an erroneous legal assumption: that racial balance is to be pursued wherever and whenever it is possible."[141] After finding that the Charlotte school

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1980s; (4) the racial significance of the siting of various new schools within the county; and (5) the weight and significance of trends toward greater racial imbalance in some schools in more recent years. *See id.*

136. *See* Martin v. Charlotte-Mecklenburg Bd. of Educ., 475 F. Supp. 1318, 1328–40 (W.D.N.C. 1979), *aff'd*, 626 F.2d 1165, 1167 (4th Cir. 1980).

137. *See Capacchione*, 57 F. Supp. 2d at 250–51, 255; *see also* Brief of Plaintiffs-Appellants (Corrected) at 26–36, 43–45, 46–48, Belk v. Charlotte-Mecklenburg Bd. of Educ. (4th Cir. filed Feb. 1, 2000) (Nos. 99-2389, 99-2391) (arguing that the district court misunderstood, misstated, and improperly evaluated much of the pertinent evidence; hence, that its factual findings on the persistence of vestiges of segregation in student assignments, quality of school facilities, and faculty assignments were clearly erroneous under Rule 52 of the Federal Rules of Civil Procedure).

138. *Capacchione*, 57 F. Supp. 2d at 256.

139. *See id.* at 253; *see also id.* at 282 (assessing the school board's "good faith compliance," the district court noted that "since the final order was entered in *Swann* in 1975, the *Swann* plaintiffs have never filed a motion for further relief").

140. 503 U.S. 467 (1992).

141. *Capacchione*, 57 F. Supp. 2d at 250; *see also id.* at 255–56 (stating that further adjustments of the racial composition of the school system are not required once the duty to desegregate has been satisfied). The district court quoted the Supreme Court's holding in *Freeman*:

> Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is

board had "complied fully and satisfactorily with the student assignment aspects of the court-ordered desegregation plan" and concluding that whatever racial disparities still plagued the public schools were either *de minimus* or were caused by factors other than the present effects of prior segregation, the district court held that the school system's student assignment plans had "achieved its objective of creating a unitary school system . . . to the extent practicable."[142]

The *Swann* plaintiffs and the Charlotte board fared no better as the court turned its consideration, one by one, to the other *Green* factors—faculty assignments, staff assignments, facilities and resources, transportation, extracurricular activities—and to a number of additional areas that plaintiffs contended were plagued by continuing racial disparities, including teacher quality, student achievement, and student discipline.[143] In all of these areas, the court found either that the racial disparities were minimal or that continuing racial disparities were tied to factors, such as changing demographics, largely beyond the Charlotte board's control.[144]

B. *The District Court's Injunction Against Future Use of Racial Considerations in Student Assignments*

The *Capacchione '99* lawsuit was precipitated by the Charlotte board's adoption in 1992 of a more flexible and effective student assignment alternative—magnet schools—that promised to afford choices not available to parents under mandatory student assignment plans. The Charlotte board turned to magnet schools in the early 1990s, hoping they could attract children of various races and thereby decrease the growing racial imbalance emerging in many schools

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under no duty to remedy imbalance that is caused by demographic factors. *Id.* at 250 (quoting *Freeman*, 503 U.S. at 494).

142. *Id.* at 257; *see also id.* at 249–56 (detailing the evidence in support of the district court's factual conclusions).

143. *See id.* at 257–82.

144. *See, e.g., id.* at 261 (finding that "the remaining imbalance [in faculty assignments] is too small to be considered indicative of a school system that is segregating its faculty," and that "the deficiencies are generally attributable to factors outside [the Charlotte board's] control, such as the shortage of teachers and the impact of residential demographics on schools' faculty compositions"); *id.* at 266–67 (finding that "inequities in facilities exist throughout the system regardless of the racial makeup of the school" and that "no witness was able to provide any evidence to show a causal link between current disparities in facilities and the dual system"). The *Swann '99* plaintiffs have contested as clearly erroneous the district court's findings both on faculty assignments and on the adequacy of facilities and resources in their appeal to the Fourth Circuit. *See* Brief of Plaintiffs-Appellants (Corrected) at 38–48, Belk v. Charlotte-Mecklenburg Bd. of Educ. (4th Cir. filed Feb. 1, 2000) (Nos. 99-2389, 99-2391).

throughout the district.[145] Magnet schools are designed to draw substantial numbers of students of different backgrounds by offering special curricula, such as communications arts, Montessori methods, advanced math and science, or foreign languages. They are lauded by many conservative critics of school desegregation as a preferable means in achieving diversity, because they are filled by voluntary, student- and parent-initiated requests rather than by mandatory student assignments.[146]

The *Capacchione '97* parents complained that although the board now permitted greater parental choice, it continued to honor its outstanding desegregation orders by employing racial criteria in selecting students from among magnet school applicants. The actual selection process used in Charlotte offered available seats first to applicants who resided especially close to the schools and to those who had siblings already attending the schools.[147] Thereafter "selected students from a black [student] lottery and a non-black [student] lottery until the precise racial balance [reflecting the systemwide racial composition was] achieved."[148] Mr. Capacchione alleged that his daughter had been denied admission to the magnet school of her choice "due to a rigid racial enrollment quota."[149]

One irony in the court's ultimate resolution of *Capacchione '97* is that its injunction implicitly undermined the most celebrated value in the Supreme Court's school desegregation jurisprudence since *Milliken v. Bradley*[150] in 1974: "local control over the operation of schools."[151] In *Milliken*, the Court described local control as "essential," because it "affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.' "[152] In another key

145. *See Capacchione*, 57 F. Supp. 2d at 239; *see also id.* at 249–50 (providing greater detail on the rationale and design of the 1992 adoption of the magnet schools approach).

146. *See generally* DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 223–25 (1995) (highlighting the administrative and social advantages of voluntary magnet school programs); CHRISTINE H. ROSSELLE, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING 209–11 (1990) (same).

147. *See Capacchione*, 57 F. Supp. 2d at 287.

148. *Id.*

149. *Id.* at 239.

150. 418 U.S. 717 (1974).

151. *Id.* at 741 (stating that local control of schools is the most "deeply rooted" tradition in public education).

152. *Id.* at 741–42 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)); *see also* Missouri v. Jenkins, 515 U.S. 70, 99 (1995) (reemphasizing that "our cases

opinion stressing local control of education, *San Antonio Independent School District v. Rodriguez*,[153] Justice Powell stressed that the federal judiciary's "lack of specialized knowledge and experience" about public education should counsel against interference with informed judgments made by local school officials, especially since the judicial exposition of "inflexible constitutional restraints ... could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."[154] Although the Charlotte board's move to magnet schools had the electoral support of its citizenry, though its magnet school programs were designed to "keep[] abreast of ever-changing conditions,"[155] and though the board was acting to assure public school diversity as an educational goal, the district court in *Capacchione '99* wrenched away from the board, with one hand, the very autonomy it purported to bestow with the other.

C. *A Critique of the District Court's Decision*

As indicated, the district court resolved two clusters of knotty questions in deciding these cases. The first involved the legal and factual issues that flowed directly from the old *Swann* case: whether in light of the new jurisprudence of *Dowell*, *Freeman*, and *Jenkins III*, the Charlotte-Mecklenburg school district was no longer a racially dual system, but desegregated to the extent practicable and therefore unitary. Although those questions are difficult, and their answers

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recognize that local autonomy of school districts is a vital national tradition ... and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution"); Freeman v. Pitts, 503 U.S. 467, 490 (1992) (declaring that to return "schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system"); Board of Educ. v. Dowell, 498 U.S. 237, 247–48 (1991) (observing that "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination"); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) (asserting that "local autonomy of school districts is a vital national tradition").

153. 411 U.S. 1 (1973).

154. *Id.* at 42–43; *see also* United States v. Charleston County Sch. Dist., 960 F.2d 1227, 1233 (4th Cir. 1992) (lauding "[t]he local determination of school attendance zones" as "a tradition as rich as the neighborhood school itself"); *cf.* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 371 (4th Cir. 1998) (insisting that "it is far better public policy" to entrust school curricular decisions "to the local school authorities" than to teachers "who would be responsible only to ... judges"); *id.* at 371 (Wilkinson, C.J., concurring) (condemning the tendency to "approach education as a federal judicial enterprise," rather than to afford "school boards the right to direct their educational curricula through democratic means").

155. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 43.

invite serious criticism, I will not address them here. Instead, I will focus on the second legal question presented by *Capacchione '99*: whether the school board's continued use of race-conscious selection processes in its magnet schools, or in other student assignment choices, following a finding of unitary status, violates the Equal Protection Clause.

The district court began its analysis by turning to *Croson*, *Adarand*, and related cases, from which it identified two premises: first, that all racial classifications, "regardless of whether the classification is intended to burden or benefit a particular race,"[156] must survive strict judicial scrutiny; and second, that "[m]odern Supreme Court precedent suggests that there is only one compelling state interest that will justify race-based classifications: remedying the effects of past racial discrimination."[157] For this second premise, the court cited only *Croson*, a dissent from *Metro Broadcasting, Inc. v. Federal Communications Commission*,[158] and a Fifth Circuit decision regarding admissions decisions at the University of Texas Law School.[159]

The district court reasoned from its two major premises that, although the Charlotte board's prior use of race may have been justified in response to the original *Swann* case—since its legal obligation was to rectify its own prior, adjudicated acts of discrimination—once the board was granted unitary status, it was deprived of any compelling state end that might justify its use of race-based criteria in future student assignments. The court held that "[a]bsent a constitutionally permissible remedial justification, [the Charlotte school board] shall not foreclose students from consideration for admission into certain schools or educational programs simply because of their racial or ethnic category."[160]

Although the narrowest reading of the district court's order prohibited only the school board's use of racial devices in making admissions decisions involving magnet schools, its rationale is

156. Capacchione v. Charlotte-Mecklenburg Schools, 57 F. Supp. 2d 228, 241 (W.D.N.C. 1999).

157. *Id.*

158. 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Chief Justice Rehnquist and Justices Scalia and Kennedy joined in Justice O'Connor's dissent. *See Metro Broadcasting*, 497 U.S. at 602.

159. *See Capacchione*, 57 F. Supp. 2d at 241 (citing Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996)).

160. *Id.* at 292; *see also id.* at 241 (stating that remedial classifications are the only race-based classifications that constitute a compelling state interest).

undeniably broader. It appears to forestall all voluntary use of racial criteria by the Charlotte school board in making any student assignments, whether to special magnet schools or to other schools or programs.

As I contended earlier, when a court so profoundly alters the prior educational (and judicial) landscape, it is obligated both to substantiate its own reading of binding precedents and to confront and distinguish any contrary precedents. *Capacchione* has done neither. The National School Boards Association and the North Carolina School Boards Association have since argued that the district court's first premise is faulty, since "strict scrutiny ought not apply to racial diversity efforts in student assignment."[161] I will not address that argument here, because Supreme Court precedents provide plausible, though hardly irrefutable, support for the district court's assumption that all race-conscious governmental actions must survive strict judicial scrutiny.

Instead, I will examine the second linchpin of the district court's reasoning—its assertion that "[m]odern Supreme Court precedent suggests that there is only one compelling state interest that will justify race-based classifications: remedying the effects of past racial discrimination."[162] If this statement were legally accurate or precedentially compelled, the district court's overall judgment would be legally sound (even if pedagogically destructive). Because it is neither, the district court's order and holding are gravely deficient.

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161. Brief of *Amici Curiae* North Carolina School Boards Association and National School Boards Association at 16, Belk v. Charlotte-Mecklenburg Bd. of Educ. (4th Cir. filed Feb. 1, 2000) (Nos. 99-2389, 99-2391). Their argument depends upon three broad propositions. First, they contend that "[c]onstitutional claims are analyzed differently when they arise in the public school context." *Id.* at 17. As support for this contention, they cite several Supreme Court decisions, in a variety of other constitutional contexts, that modify general constitutional holdings within the school context. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (shaping a special First Amendment free speech doctrine for the public school context); New Jersey v. T.L.O., 469 U.S. 325, 240 (1985) (modifying Fourth Amendment search and seizure protections in the public school context); Ingraham v. Wright, 430 U.S. 651, 664 (1977) (declining to extend Eighth Amendment protection against cruel and unusual punishment to the public school context); Goss v. Lopez, 419 U.S. 565, 583 (1975) (addressing special procedural due process concerns within the public school context); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (addressing First Amendment symbolic expression in the public school context). Second, they argue that "diversity in student assignments . . . does not hold the same potential harms that race consciousness does in other areas." Brief of *Amici Curiae* North Carolina School Boards Association and National School Boards Association at 21, *Belk* (4th Cir. filed Feb. 1, 2000) (Nos. 99-2389, 99-2391). Finally, they argue that there is a compelling state interest in promoting educational diversity. *See id.* at 26.

162. *Capacchione*, 57 F. Supp. 2d at 241.

1. The Dubious Doctrinal Support

An investigation of the "[m]odern Supreme Court precedent"[163] invoked by the district court properly begins with Justice O'Connor's opinion in *Croson*, the Richmond set-aside case. The "initial battle" among the parties to *Croson*, as Justice O'Connor recounted, was "the scope of the city's power to adopt legislation designed to address the effects of past discrimination."[164] In *Croson*, the parties drew their battle lines over the reach of the Court's prior decision in *Fullilove v. Klutznick*,[165] which recognized Congressional authority to engage in race-conscious remedial relief in order "to identify and redress the effects of society-wide discrimination."[166] In her *Croson* opinion, Justice O'Connor explained that the latitude allowed Congress by *Fullilove* was dependent upon "the unique remedial powers of Congress under Section 5 of the Fourteenth Amendment."[167] Because of its unique role "to enforce the dictates of the Fourteenth Amendment" under Section 5, *Fullilove* allowed Congress to use racial classifications to "identify and redress the effects of society-wide discrimination" under a more deferential standard of judicial review.[168] In contrast, Justice O'Connor reasoned that "the States and their political subdivisions are [not] free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the *States must undertake any remedial efforts* in accordance with that provision."[169]

The *Croson* Court went on to identify two remedial interests that

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163. *Id.*

164. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 486 (1989).

165. 448 U.S. 448 (1980), *overruled in part by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

166. *Croson*, 488 U.S. at 490. *Fullilove* upheld a "minority business enterprise" provision of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (codified as amended at 42 U.S.C.A. §§ 6701–6736 (1995 & Supp. 2000)), that required the Secretary of Commerce to obtain assurances that 10% of every public works project funded under the Act would be expended for businesses that were at least 50% owned by "minority group members," defined in racial, ethnic, and national origin terms. *See Fullilove*, 448 U.S. at 453–54.

167. *Croson*, 488 U.S. at 488.

168. *Id.* at 490. Justice O'Connor later repudiated this distinction in *Adarand*, 515 U.S. at 230–31, 235 (observing that "various Members of th[e] Court have taken different views of the authority [Section] 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority," but holding, for a majority of the Court, that "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest").

169. *Croson*, 488 U.S. at 490 (emphasis added).

might justify a state or city's use of racial classifications—to redress its own prior, proven discrimination or to end its " 'passive particip[ation]' " in an entrenched system of racial exclusion in the private market.[170] What is crucial for my purpose is that Justice O'Connor's account did not purport to catalogue all circumstances in which race might properly be used; *Croson* simply was not a case in which the Supreme Court set out to identify the full roster of state interests that might be sufficiently compelling to justify state use of racial distinctions. Instead, *Croson* addressed a more limited question: what is the authority of a state or city to use race *within a remedial context*? *Croson* answers that remedial uses of race by state actors must be carefully circumscribed.[171]

To be sure, one voice in *Croson* strongly urges that the *only* permissible uses of race are for remedial purposes and that even then such uses must be employed sparingly. The voice is that of Justice Scalia, who wrote that "only a social emergency rising to the level of imminent danger to life and limb" could justify non-remedial, race-conscious state action.[172] Justice Scalia later summarized his contention: "In my view there is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination:' where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."[173]

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170. *Id.* at 491–92; *see also id.* at 504 (maintaining that a state may use racial classifications to address its own prior discrimination, but may not rely merely on findings of national historical discrimination in a particular field to justify using racial classifications). Only Chief Justice Rehnquist and Justice White joined this portion of Justice O'Connor's opinion; elsewhere, she spoke for at least five members of the Court. *See id.* at 476.

171. *See id.* at 493 (stating that strict judicial scrutiny is necessary for remedial racial classifications so that a court can determine "[w]hat classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics").

172. *Id.* at 520–21 (Scalia, J., concurring in the judgment). His full quotation reads as follows:

> I do not agree ... with Justice O'Connor's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination." The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected .... At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates ... can justify an exception to the principle ....

Id. (Scalia, J., concurring in the judgment) (citation omitted).

173. *Id.* at 524 (Scalia, J., concurring in the judgment) (citation omitted).

Indeed, no Justice in *Croson* came closer than did Justice Scalia to addressing the very issue before the federal district court in *Capacchione '99*—the use of voluntary, race-conscious methods by school boards *outside* of a remedial context. Justice Scalia first acknowledged the large body of Supreme Court desegregation law, including *Green* and *Swann*, that sanctioned the use of race-conscious student assignment by school boards to remediate their own prior discrimination. He then added: "[I]t is implicit in our cases that after the dual school system has been completely disestablished, the States may no longer assign students by race."[174] It is revealing, however, that Justice Scalia's sole authority for the "implicit" principle he attempted to identify was a single "*cf.*" citation to the Court's 1976 decision in *Pasadena City Board of Education v. Spangler*.[175] Upon examination, *Pasadena* offers no support at all for Justice Scalia's position. Indeed, the case stands for the very different proposition that once a dual system has been completely disestablished, federal courts may not order further race-conscious relief.[176] *Pasadena* says absolutely nothing about the latitude open to school boards that act voluntarily. It is no wonder, then, that Justice Scalia graced his principal authority with a "*cf.*" citation.

If Justice Scalia spoke for the unanimous Supreme Court, or even for a bare majority of Justices, *Capacchione '99* would have found its "[m]odern Supreme Court precedent" on point. Yet no other Justice chose to join Justice Scalia, either in his more general argument insisting upon the restricted roster of compelling governmental interests, or in his revisionist reading of *Pasadena*. Indeed, Justice O'Connor's opinion seemed determined to repudiate Justice Scalia's more extreme interpretation, noting that

> the purpose of strict scrutiny is to "smoke out" illegitimate uses of race *by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.* The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[177]

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174. *Id.* at 525 (Scalia, J., concurring in the judgment).

175. *Id.* (Scalia, J., concurring in the judgment) (citing Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 (1976)).

176. *See Pasadena*, 427 U.S. at 434–35.

177. *Croson*, 488 U.S. at 493 (emphasis added). In this portion of the opinion, Justice O'Connor was joined by Chief Justice Rehnquist, Justice White, and Justice Kennedy. *See id.* at 476.

In other words, contrary to Justice Scalia's view, Justice O'Connor implied that there *are* state goals "important enough to warrant use" of racial considerations, even though such uses are subject to strict judicial scrutiny to ferret out "illegitimate" legislative motives such as "racial prejudice or stereotype."[178]

This theme—that strict scrutiny of state decisions employing racial classifications should not result invariably in their judicial invalidation—has been reemphasized in several recent cases. For example, in *Adarand*, Justice O'Connor, writing for the Court, sought to correct the misapprehension that all governmental uses of racial classifications are forbidden: "[s]trict scrutiny does not 'treat dissimilar race-based decisions as though they were equally objectionable . . .; to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not.' " [179] By requiring strict scrutiny of racial classifications, she explained, "we require courts to make sure that a governmental classification based on race . . . is legitimate, before permitting unequal treatment based on race to proceed."[180] Plainly intending to underscore the point, the Court added:

> Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." . . . The unhappy persistence of both the practice and the lingering effects of

178. *Id.* at 493. To be sure, as Justice O'Connor was explaining the central purpose of the strict scrutiny standard—"to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool"—she pointed out the "danger of stigmatic harm" that racial classifications often carry, and observed in passing that "[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority." *Id.* Although one Ninth Circuit judge, writing in dissent, has characterized Justice O'Connor's remark as holding that racial classifications can never be justified except in a remedial context, *see* Hunter *ex rel.* Brandt v. Regents of Univ. of Cal., 190 F.3d 1061, 1070 (9th Cir. 1999) (Beezer, J., dissenting), other jurists, such as Judge Richard Posner of the Seventh Circuit, have declined to read Justice O'Connor's remark in so categorical and sweeping a fashion. *See, e.g.*, Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996) (stating that "[a] judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him"). Justice O'Connor's remark was made to explain why racial classifications are potentially dangerous, since they may promote "notions of racial inferiority" if not confined to circumstances (such as remedial ones) where no such inference could properly be drawn. *Croson*, 488 U.S. at 493. Her broader discussion, as I noted above, implicitly refutes the suggestion that she intended to use *Croson* as the chosen vehicle to catalogue definitively all permissible uses of race by government.

179. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228 (1995) (emphasis in original) (quoting *Adarand*, 515 U.S. at 245) (Stevens, J., dissenting).

180. *Id.* at 228.

> racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it .... When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.[181]

As in *Croson*, Justice Scalia demurred in *Adarand* from this crucial point, insisting that race-conscious classifications should only be used to afford remedies to the proven victims of the state's own prior discrimination.[182] On this occasion, Justice Scalia's argument managed to win agreement from a second Justice, Justice Thomas, who wrote separately that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice."[183]

Thus far, we have polled only the plurality and majority Justices in reviewing *Croson* and *Adarand.* In both of those cases, however, all of the dissenters would have recognized a far broader range of compelling state interests that would justify a state's adoption of race-conscious policies. For example, Justice Stevens, concurring in *Croson*, argued that the Equal Protection Clause should be interpreted to permit the race-conscious selection of public school teachers if a "school board had reasonably concluded that an integrated faculty could provide educational benefits to the entire student body that could not be provided by an all-white, or nearly all-white, faculty."[184] Justice Stevens later noted in *Adarand* that the majority had neither reached nor decided the question of diversity as a possible compelling governmental interest: "[t]he proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today—indeed,

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181. *Id.* at 237 (citation omitted); *see also* Missouri v. Jenkins, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring) (observing, in a school desegregation context, that while courts may prescribe race-conscious remedies only after finding intentional discrimination, "the representative branches" by contrast have "ample authority to combat racial injustice," and once again emphasizing that "it is not true that strict scrutiny [of legislative decisions that create racial classifications] is 'strict in theory, but fatal in fact' ").

182. *See Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

183. *Id.* at 241 (Thomas, J., concurring in part and concurring in the judgment).

184. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 512 (1989) (Stevens, J., concurring in part and concurring in the judgment); *see also Adarand*, 515 U.S. at 243 (Stevens, J., dissenting) (contending that benign race-conscious state actions should not be subjected to strict judicial scrutiny, since "[n]o sensible conception of the Government's constitutional obligation to 'govern impartially,' ... should ignore [the] distinction" between "a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination") (citation omitted).

the question is not remotely presented in this case . . . ."[185]

Justice Marshall, joined by Justices Brennan and Blackmun in *Croson*, would have subjected race-conscious state classifications to no more than "intermediate-level" judicial scrutiny.[186] Moreover, Justice Marshall would have upheld not only the City of Richmond's goal of remedying prior societal discrimination but also "the prospective [goal] . . . of preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination."[187]

Finally, in *Adarand*, both Justice Souter, in a dissent joined by Justices Ginsburg and Breyer, and Justice Ginsburg, in a dissent joined by Justice Breyer, voiced support for race-conscious actions by state and federal governments that would diminish lingering racial discrimination in the broader society.[188]

To summarize the analysis thus far, the only direct support for the view of "[m]odern Supreme Court precedent" upon which the district court relied in *Capacchione '99* has come from two Justices, Scalia and Thomas, who have never attracted additional support for their views from any other member of the Court. To the contrary, their views appear to have been considered and repudiated, not only by the four more liberal members of the current Court (Justices Stevens, Souter, Ginsburg, and Breyer), but also by Justices O'Connor and Kennedy, and Chief Justice Rehnquist as well, in both *Croson* and *Adarand*.[189]

Nonetheless, the district court looked to another Supreme Court case in building its string of "[m]odern Supreme Court precedents": a dissenting opinion by Justice O'Connor, joined by the Chief Justice

185. *Adarand*, 515 U.S. at 258 (Stevens, J., dissenting) (emphasis in original).

186. *Croson*, 488 U.S. at 551–52 (Marshall, J., dissenting).

187. *Id.* at 537 (Marshall, J., dissenting).

188. *See Adarand*, 515 U.S. at 264–71 (Souter, J., dissenting); *id.* at 271–76 (Ginsburg, J., dissenting).

189. After reviewing *Croson*, *Adarand*, and other pertinent authorities, Judge Richard Posner of the Seventh Circuit concluded in 1996 that "[a] judge would be unreasonable to conclude that no other consideration except of history of discrimination" could warrant state use of race-conscious measures without first considering the specific circumstances that presented themselves to state policymakers. Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996). In *Wittmer*, the court examined evidence proffered by the State of Illinois that it had a special need, in staffing prison "boot camps," to select at least some African-American correctional lieutenants to work with the young, minority inmates. After assessing that evidence, the Seventh Circuit upheld Illinois's race-conscious selection of an African-American over other white candidates who scored higher on certain qualifying tests for the position. Judge Posner expressly held that "the rectification of past discrimination is not the only setting in which government officials can lawfully take race into account in making decisions." *Id.*

and by Justices Scalia and Kennedy, in the 1990 case *Metro Broadcasting, Inc. v. FCC*.[190] The five-Justice majority in *Metro Broadcasting* upheld the promotion of "programming diversity" as a sufficiently important governmental end to justify a racial or ethnic preference in the federal government's awarding or transferring of certain FCC-supervised broadcasting licenses.[191] In so doing, the majority did not apply a strict scrutiny standard, but a lower "intermediate" standard of review, observing the distinction (drawn the year before in *Croson* by Justice O'Connor[192]) between the broader remedial authority of Congress under Section Five of the Fourteenth Amendment and the narrower remedial authority of states and local governments under Section 1 of the Fourteenth Amendment.[193] The majority reasoned that while "strict scrutiny" was appropriate when a federal court assessed race-conscious action by a state or local government, greater deference, and hence a lower standard of judicial scrutiny, was appropriate when assessing Congressional or FCC action.[194]

In her dissent, Justice O'Connor strongly objected to any constitutional distinction between the Equal Protection Clause standards applicable to the states and to the federal government.[195] Beyond her disagreement on the standard of review, however, Justice O'Connor subjected the FCC's justification of "broadcast diversity" to a withering analytical attack. The heart of her argument was as follows:

> Modern equal protection doctrine has recognized only one [compelling governmental] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications. The Court does not claim otherwise. Rather, it employs its novel standard and claims that this asserted interest need only be, and is, "important" [under intermediate scrutiny review]. This conclusion twice

190. 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting), *overruled by Adarand*, 515 U.S. at 227.

191. *See Metro Broadcasting*, 497 U.S. at 566–68.

192. *See Croson*, 488 U.S. at 486–91.

193. *See Metro Broadcasting*, 497 U.S. at 563–66.

194. *See id.* at 565–66.

195. *See id.* at 602–03. Indeed, five years later in *Adarand*, Justice O'Connor gained an additional vote and wrote for a majority that expressly overruled *Metro Broadcasting* insofar as it applied a different, lower standard of review to race-conscious actions by Congress or other federal actors. *See Adarand*, 515 U.S. at 226–27.

> compounds the Court's initial error of reducing its level of scrutiny of a racial classification. First, it *too casually* extends the justifications that might support racial classification, beyond that of remedying past discriminations .... Second, it has initiated this departure by endorsing an insubstantial interest ....[196]

The district court in *Capacchione* almost certainly drew its generalization about the permissible range of "compelling governmental interests" from this paragraph. Yet a close reading defeats the meaning that *Capacchione* would ascribe to the passage. Justice O'Connor clearly was not speaking prescriptively here—to set the outer boundaries of compelling state interest law—but instead descriptively—to observe that no previous decision of the Court had recognized a non-remedial interest as compelling. Her descriptive use appeared even more clearly in her follow-up critique, in which she lamented that the *Metro Broadcasting* majority's use of a lower standard of review allowed the Court to extend "too casually" the justification for a race-conscious action.[197] If Justice O'Connor really intended to state that only remedial ends could ever be compelling, it would not have mattered whether the majority's disregard of such a categorical rule had been casual or deliberate. What evidently distressed Justice O'Connor was that, by lowering the standard of review, the majority had entered unfamiliar legal territory—approving a non-remedial justification for a racial classification—without the careful consideration that strict scrutiny entails. Justice O'Connor's repeated and emphatic general insistence in both *Adarand* and *Croson* that other compelling governmental interests do exist and that they might survive strict scrutiny made it unmistakable that neither she nor the other *Metro Broadcasting* dissenters (apart from Justice Scalia, of course) intended to close the door permanently on all governmental interests that might justify race-conscious actions for non-remedial ends.[198]

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196. *Metro Broadcasting*, 497 U.S. at 612–13 (emphasis added).

197. *Id.* at 613.

198. Indeed, as early as 1986, Justice O'Connor had already distinguished between state affirmative action programs whose interest was in "remedying past or present racial discrimination by a state actor" on the one hand, and "a state['s] interest in the promotion of racial diversity ... at least in the context of higher education," on the other hand, noting that *both* interests had been recognized as compelling under the Court's precedents. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor added that "certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of

Beyond *Croson*, *Adarand*, and the sentence from the *Metro Broadcasting* dissent (which cannot bear the weight the *Capacchione* court intended for it), the authority for the district court's major premise about "[m]odern Supreme Court precedent" dwindles to a single Fifth Circuit case, *Hopwood v. Texas*.[199] To be sure, this opinion provides solid support for the district court, as *Hopwood* did indeed repudiate the use of race in non-remedial settings.[200] All would be in order, then, except that *Hopwood* is not a Supreme Court decision, nor was it subsequently affirmed by the Supreme Court.[201] It was, instead, a bold departure by a lower federal court that, like *Capacchione*, set sail against the winds of prior Supreme Court precedents—namely *Swann*, *Bustop*, and *Bakke*—with apparent confidence that it could foresee a future time in which the Court would revise its former handiwork. In sum, *Capacchione '99*'s conclusion that educational diversity could never be deemed "compelling" under the Equal Protection Clause has no substantial precedential support.[202]

2. The Unsteady Jurisprudential Foundation

It is perhaps unjustified to judge a court's work solely on the strength of its string citations. Another venerable jurisprudential route can lead to a defensible judicial conclusion—the use of reasoned analogy and principle. If the underlying concerns that prompted the Supreme Court to reject race-conscious classifications

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affirmative actions policies." *Id.*

199. 78 F.3d 932 (5th Cir. 1996).

200. *See id.* at 944.

201. Instead, the Court denied certiorari. *See* Hopwood v. Texas, 518 U.S. 1033 (1996). Justice Ginsburg, joined by Justice Souter, wrote a brief opinion respecting the denial of certiorari, emphasizing that, while the use of race by public universities in their admissions decisions was "an issue of great national importance," *Hopwood* itself was not a good vehicle for Supreme Court review, since all parties conceded "that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional" and had " 'long since been discontinued.' " *Id.* at 1034 (citation omitted).

202. Moreover, the *Capacchione '99* court failed to address significant adverse precedent. Beyond the Supreme Court authorities discussed at pages 1739–44 *supra*, he district court might have consulted the Fourth Circuit's earlier decision in *Riddick v. School Board*, 784 F.2d 521, 543–44 (4th Cir. 1986) (upholding the authority of a unitary school board to take "white flight" into consideration and to adopt a plan relying upon neighborhood schools with the aim "to keep as many white students in public education as possible and so achieve a stably integrated school system"). *See also* Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705, 717–21 (2d Cir. 1979) (holding that a race-conscious state student assignment plan, designed to minimize white flight from public schools, can survive strict scrutiny if it is narrowly tailored to attain the compelling end of promoting racially integrated public schools).

in *Croson* or *Adarand* likewise apply in *Capacchione*, then the district court's decision might be vindicated, if not by precedent, then by an even worthier and more substantial justification: the congruence between present circumstances and the rationale that prompted the Supreme Court's prior decisions.

To evaluate *Capacchione* on these grounds, it is necessary first to identify the concerns that have raised the Supreme Court's guard against the use of race-conscious state classifications. In *Croson*, Justice O'Connor identified the following concerns: (1) all citizens' " 'personal rights' to be treated with equal dignity and respect," (2) a concern about the promotion of "illegitimate notions of racial inferiority," (3) the prospect that racial classifications would become an unacceptable form of "simple racial politics," (4) "a danger of stigmatic harm,"[203] and (5) the prospect of " 'reinforc[ing] common stereotypes.' "[204] The *Croson* Court also worried that allowing states free reign to use racial classifications might "give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field."[205] Some variant of these concerns reappeared in *Adarand* and *Jenkins III*.

Most of these concerns arise in circumstances when a government must award a scarce resource to one among several rival claimants of different races—whether a government construction contract (*Croson*, *Adarand*), a government franchise (*Metro Broadcasting*), a seat in a graduate or professional school (*Bakke*, *Hopwood*), a merit-based scholarship (*Podberesky v. Kirwan*[206]) or a seat in a competitive-exam high school (*Wessmann v. Gittens*[207]). When a state bestows such glittering prizes, it is plausible to reason, as the district court did in *Capacchione*, that " ' "the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome." ' "[208] It seems "unfair" or "unequal" if such decisions, which ought be based upon worth or merit—lowest bid, best qualified, most competitive—may have tipped toward one less qualified or less competitive solely because of his or

203. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

204. *Id.* at 493–94 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)).

205. *Croson*, 488 U.S. at 499.

206. 38 F.3d 147, 151 (4th Cir. 1994).

207. 160 F.3d 790, 791–92 (1st Cir. 1998).

208. Capacchione v. Charlotte-Mecklenburg Schools, 57 F. Supp. 2d 228, 241 (W.D.N.C. 1999) (quoting Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 212 (4th Cir. 1993) (quoting Maryland Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993))).

her race or ethnicity. Under such circumstances, others may sense that these recipients are actually inferior, and their unspoken sentiment not only breeds resentment from others but also stigmatizes those selected on racial grounds.

In contrast, access to second grade teachers or fifth grade classrooms, in Charlotte and elsewhere, is not a scarce resource but a "public good."[209] Every child is sent to school; no child is denied. Of course, every public elementary and secondary school has its own special characteristics: its history, its identifying architectural features, its principal, and its corps of teachers (all with their own special talents and personality). Yet along with then-Justice Rehnquist in *Bustop*, let me observe that there is no "federal right" granted any parent or child that assures attendance at any particular public school.[210] For legal purposes, public schools are deemed equivalent and fungible, and to that extent, at least, our law normally recognizes no "winners" or "losers" in the distribution of public school resources.[211] Significantly, a child's assignment to a particular elementary school does not stigmatize in the ways that worried Justice O'Connor in *Adarand* and *Croson*, because the criteria for assignment do not reflect upon the character of students or their ability to perform.[212]

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209. *See generally* JAMES A. CAPORASO & DAVID P. LEVINE, THEORIES OF POLITICAL ECONOMY 93–95 (1992) (explaining that neoclassical economists have identified some goods and services, such as education and public roads, as "public goods," that "seem so important that they are provided, with varying degrees of success, by nearly all countries").

210. *See, e.g.*, *In re* United States *ex rel.* Missouri State High Sch. Activities Ass'n, 682 F.2d 147, 152 (8th Cir. 1982) (observing that "[s]tudents have no indefeasible right to associate through choice of school," and that "[m]andatory assignment to public schools based on place of residence or other factors is clearly permissible"); Wharton v. Abbeville Sch. Dist. No. 60, 608 F. Supp. 70, 76 (D.S.C. 1984) (noting that plaintiffs in that school desegregation case had "presented no independent source, either in the law of South Carolina, or otherwise, which has granted to them a legitimate claim of entitlement to attend a particular school"); Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657, 663 (Wash. 1972) (finding "no authority in law for the proposition that parents have a vested right to send their children to, or that children have a vested right to attend, any particular school"); *cf.* Bronson v. Board of Educ., 550 F. Supp. 941, 958 (S.D. Ohio 1982) (noting that "Ohio law . . . does not confer a right upon pupils to attend a specific school, even if they were previously assigned thereto"); *see also* authorities cited in note 274.

211. As Chief Judge Wilkinson wrote, "[i]n drafting attendance plans, school boards have always been free to deny parental preference for any one of a hundred reasons . . . . [O]nce a child is in a public school, the parent cannot dictate what teacher he gets, what courses he takes, what grades he receives, or what discipline he meets." WILKINSON, *supra* note 22, at 109.

212. Interestingly, the *Capacchione* parents did not agree on what educational assignments they desired for their children. For example, William Capacchione sought for his daughter to attend a magnet school located farther from her home than the

Some recent cases have involved the use of racial criteria in the context of special "merit schools," *i.e.*, public schools where admission is normally predicated on objective indicia of excellence. The First Circuit's recent decision in *Wessmann v. Gittens*[213] offers perhaps the greatest support for the district court's position, and it understandably became a source of special reliance.[214] *Wessmann* involved admission to Boston Latin, where access is reserved for students who score the highest on competitive merit examinations. The First Circuit's decision in that context merely assured that when school boards operate special schools with the goal of nurturing exceptional talent, no child should be deprived of a place earned on the merits because of racial considerations—even to further diversity ends. Typical student assignments to public schools, by contrast, are not made on the basis of merit, and, therefore, *Wessmann*'s logic simply does not extend to those routine choices.[215]

Indeed, school boards are well aware that while teachers are one important educational resource for achieving the school's mission, fellow students are another. As the world grows more racially and

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neighborhood school to which she had been assigned. *See* Debbie Cenziper, *Parents Clash on School Policies: Mecklenburg Parents Group*, CHARLOTTE OBSERVER, Apr. 11, 1999, at 5B. By contrast, parent Karen Bentley preferred a neighborhood school for her daughter, even though she had elected to send her daughter to a magnet school rather than risk possible future reassignment if her daughter had decided to attend their local neighborhood school. A third parent, Michael Grant, complained that, although his son did manage to attend the magnet school of his choice, "other [minority] elementary school kids that came in were not as prepared, so [his son's] classes were slowed down with these other students trying to get them up to the same level" as his son. *Id.* Hence, each of these three plaintiff parents expected something different from a victory in *Capacchione*. One wanted his daughter to attend a magnet school; a second wanted her son to attend a neighborhood school and be assured that he would not be reassigned; and the third wanted to assure himself that children not "up to the same level" as his son would not be admitted to his son's magnet school.

213. 160 F.3d 790 (1st Cir. 1998).

214. *See* Capacchione v. Charlotte-Mecklenburg Schools, 57 F. Supp. 2d 228, 291–92 (W.D.N.C. 1999) (citing *Wessmann*, 160 F.3d at 796–809).

215. Indeed, one federal district court—responding to a broad legal challenge against the Boston School Committee's use of race as a factor in creating school attendance zones and in assigning children—has recently emphasized the special circumstances of the *Wessmann* decision and the different considerations that might plausibly govern judicial review of student assignments to most of Boston's elementary schools, "for which there are no qualifications other than residency." Boston's Children First v. City of Boston, 62 F. Supp. 2d 247, 259 (D. Mass. 1999). The court observed that when school boards assign students to such schools,"[d]iversity may well be more important at this stage than at any other," adding that "[k]indergarten is when first friendships are formed and important attitudes shaped" and that in such school assignments, there were not "any countervailing concerns about merit," unlike "*Wessmann* [which] involved an examination secondary school." *Id.*

ethnically interdependent every year, reasonable educators might well conclude that every child has a compelling interest in learning more about children of other racial and ethnic backgrounds. From that exposure, children can see for themselves the role that racial background plays (or very often, does *not* play) in prompting a child to respond to good literature, to think about civic issues, to work in groups, and to create new solutions for contemporary problems. Indeed, the pedagogical objective in assuring racially diverse classrooms seems founded not upon some chimerical stereotype about what African-American children think or how Latino children behave, but on precisely the *opposite* view—that all children share many more things in common than they do differences and that the best device for overcoming lingering racial suspicions or prejudices is exposure, not separation. These pedagogical choices rest upon a large body of social scientific evidence, conducted in the past two decades, that directly addresses and confirms the educational desirability of integrated schooling.[216]

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216. *See, e.g.*, James M. McPartland & Jomills Henry Braddock II, *Going to College and Getting a Good Job: The Impact of Desegregation, in* EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY, AND FEASIBILITY 141, 152 (Willis D. Hawley ed., 1981) (noting the positive long-term effects on the occupational status and interracial life choices of persons who have attended desegregated public schools); James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks? in* RACE, POVERTY, & AMERICAN CITIES, *supra* note 23, at 273, 300 (concluding that minority children who move from segregated Chicago city schools to integrated suburban Chicago schools are subsequently "more likely to be (1) in school, (2) in college-track classes, (3) in four-year colleges, (4) employed, and (5) employed in jobs with benefits and better pay"); Janet W. Schofield, *Promoting Positive Peer Relations in Desegregated Schools, in* BEYOND DESEGREGATION: THE POLITICS OF QUALITY IN AFRICAN AMERICAN SCHOOLING 91, 93 (Mwalimu J. Shujaa ed., 1996) (noting that public schools present many children with the opportunity to experience their first and only public or private interracial experiences); Janet W. Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597, 610 (James A. Banks & Cherry A. McGee Banks eds., 1995) (finding significant reductions in racial stereotyping, reduced interracial anxieties, and positive responses to interracial vocational settings among adults who have attended racially integrated schools); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 541–52 (1994) (concluding that desegregated educational experiences lead to significant improvements in the higher educational attainment, employment success, and residential community choice of minority students).

Moreover, credible evidence suggests that desegregated settings not only improve the social interaction of students but may lead to higher academic achievement as well. *See* Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction, in* THE BLACK-WHITE TEST SCORE GAP 1, 9, 26, 31 (Christopher Jencks & Meredith Phillips eds., 1998) (reporting extensive research findings which suggest that "[d]esegregation seems to have pushed up southern blacks' [school test] scores a little

The *Capacchione '99* court conceded as much, noting "that children may derive benefits from encounters with students of different races."[217] Moreover, the school board presented evidence demonstrating that if it switched to a race-blind, proximity-based assignment plan, seventy-one percent of Charlotte-Mecklenburg's elementary schools become racially identifiable and nineteen of these schools would be more than seventy-five percent black.[218] Overall, the school board estimated, these changes would cause "the absolute level of segregation in [Charlotte-Mecklenburg] schools to double."[219] Yet the court described the school board's "single-minded focus on racial diversity" as "a major problem" and called for students to be viewed as individuals, not "as cogs in a social experimentation machine."[220] Then with perfect assurance, in defense of a constitutional principle found nowhere in the text of the Fourteenth Amendment—indeed, interpreting that amendment contrary to the expectations of many of its Framers[221]—the court opted to impose its own policy preferences in derogation of this substantial body of empirical evidence, solemnly forbidding school board members from implementing policies that, after much deliberation and debate, they determined to be necessary to further compelling educational ends. No analogy seems more apt than that to Justice Peckham, in *Lochner*

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without affecting whites either way"); Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools*, *in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 103, 103–25 (Christine H. Rossell & Willis D. Hawley eds., 1983) (finding that desegregated public school experiences that begin in the early grades led to significant, though modest, improvements in tests scores of minority students).

217. *Capacchione*, 57 F. Supp. 2d at 291.

218. *See* Brief of Appellants Charlotte-Mecklenberg Bd. of Educ. at 29, Belk v. Charlotte-Mecklenberg Bd. of Educ. (4th Cir. filed Feb. 1, 2000) (Nos. 99-2389, 99-2391, & 00-1098).

219. *Id.*

220. *Id.*

221. In the spring of 1866, the 39th Congress adopted the Equal Protection Clause as part of its approval of the larger Fourteenth Amendment and simultaneously passed a Freedman's Bureau Act that authorized the activities of a federal agency that was devoted to the distribution of an extraordinary variety of federal benefits on explicitly racial grounds. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 239–61 (1988) (describing the concurrent struggles in Congress during 1866 to shape the Civil Rights Act of 1866, the Freedmen's Bureau Act, and the Fourteenth Amendment); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (describing the variety of post-Civil War federal "social welfare programs whose benefits were expressly limited to blacks," which "were enacted concurrently with the fourteenth amendment . . . by the same legislators who favored the constitutional guarantee of equal protection," and which therefore strongly suggest that those Framers "could not have intended [the Equal Protection Clause] to prohibit affirmative action for blacks or other disadvantaged groups").

v. New York[222]—invoking inscrutable, inflexible, high-minded principles to forbid elected representatives from implementing their own best judgments (for which they will be fully answerable at the polls) as they wrestle with serious contemporary social challenges.

III. *TUTTLE*, *EISENBERG*, AND EDUCATIONAL DIVERSITY: THE ODD RELATIONSHIP BETWEEN "COMPELLING STATE ENDS" AND PERMISSIBLE MEANS

A. Tuttle *and* Eisenberg *in the District Courts*

When the *Capacchione '99* appeal arrives at the Fourth Circuit, it will find two freshly minted precedents, both closely related to the Charlotte case on their facts and legal issues. In the first, *Tuttle v. Arlington County School Board*,[223] decided on September 24, 1999, parents challenged an Arlington County, Virginia school board policy of assigning students by weighted lottery to three public schools.[224] The parents were unhappy that their children had not been assigned to the Alternative Traditional School; they invoked the Equal Protection Clause and sought to enjoin the school board's use of race to assign "weights" to lottery participants as one of three qualifying criteria. The school board's express reason for employing the weighted lottery was "to obtain a student body 'in proportions that approximate the distribution of students from those groups in the district's overall student population.' "[225]

In earlier years, the Arlington school board employed other race-conscious student assignment policies to comply with a court order entered in a desegregation lawsuit.[226] The new admissions procedure challenged in *Tuttle*, however, did not rely on any remedial justification; the school board expressly identified two other goals:

> (1) "to prepare and educate students to live in a diverse, global society" by "reflect[ing] the diversity of the

222. 198 U.S. 45 (1905).

223. 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000).

224. *See id.* at 700–01. Specifically at issue in *Tuttle* was the admission program in the Alternative Traditional School (ATS), a public kindergarten.

225. *Id.* (citation omitted). The other two factors were whether children were from "low-income or special family background[s]" and whether their families spoke English as a first or a second language. *Id.* at 701. The full details of the policy are not germane to this discussion. In general, the policy gave some initial preference to the siblings of children already attending ATS. Only if the overall student population departed by at least 15% from the county-wide student population on all three of the weighted factors was a lottery instituted. *See id.* at 702.

226. *See* Hart v. County Sch. Bd., 459 F.2d 981, 982 (4th Cir. 1972) (per curiam).

> community" and (2) to help the School Board "serve the diverse groups of students in the district, including those from backgrounds that suggest they may come to school with educational needs that are different from or greater than others."[227]

The federal district court ruled that the school board's policy failed strict scrutiny review, reasoning that diversity does not constitute a compelling governmental interest because only remedial racial classifications are compelling.[228]

The second Fourth Circuit case, *Eisenberg v. Montgomery County Public Schools*,[229] was decided on October 6, 1999. At issue was the district's transfer policy. That policy assessed all student requests for a transfer using four factors—one of which was the "diversity profile" of the potential sending and receiving schools.[230] The diversity profile embraced not only the race and ethnicity of the requesting student, but also the racial and ethnic composition of the potential sending and receiving schools (relative to the overall composition of the district school population), as well as whether the percentage of each racial or ethnic group in each school had either increased or decreased over time.[231]

The case began after the plaintiff, Jeffrey Eisenberg, requested that his son be transferred from his assigned first grade school (an assignment based upon the parents' residence), to a "science and math magnet school."[232] Eisenberg urged that his son's " 'personal and academic potential' would benefit from the magnet school's math and science emphasis."[233] The Montgomery County, Maryland school board denied his request, explaining that his son's assigned school had a student population that was only twenty-four percent white, which was substantially below the countywide white student percentage of fifty-three percent. Moreover, during the preceding

227. *Tuttle*, 195 F.3d at 701 (quoting the Arlington County School Board's policy of using a weighted lottery to promote diversity in its schools).

228. *See id.* at 703 (quoting the district court's unpublished memorandum opinion in Tuttle v. Arlington County Sch. Bd., No. 98-418-A, 1998 U.S. Dist. LEXIS 22578, at *8 (E.D. Va. April 14, 1998)).

229. 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000). For a general overview of Montgomery County's school desegregation history and its current policies, see Susan E. Eaton, *Slipping Toward Segregation: Local Control and Eroding Desegregation in Montgomery County*, *in* DISMANTLING DESEGREGATION, *supra* note 19, at 207–39.

230. *Eisenberg*, 197 F.3d at 126.

231. *See id.* at 126–27.

232. *Id.* at 125.

233. *Id.* at 127.

three years, the white enrollment at the Eisenberg child's assigned school had fallen from nearly thirty-nine percent to twenty-four percent. His transfer would have further decreased the white enrollment, thus adversely affecting the overall racial diversity of the school.[234]

Eisenberg sued, contending that the transfer policy violated the Equal Protection Clause and the Civil Rights Act of 1964. The Montgomery County school board did not offer any remedial defense of its transfer policy because the district had never been subject to a school desegregation decree.[235] The district court denied Eisenberg's motion for injunctive relief and compensatory damages, reasoning that the county's interests in promoting diversity among students and avoiding segregative enrollment patterns were sufficiently compelling to satisfy strict scrutiny.[236] Eisenberg thereafter appealed to the Fourth Circuit.

In sum, school boards in both *Tuttle* and *Eisenberg* used race-conscious policies that directly affected student assignment decisions. Both school boards justified their policies by contending that a diverse student body was a state interest sufficiently compelling to survive strict judicial scrutiny. One district court rejected that argument; another district court accepted it.

B. "Diversity" as a Compelling State Interest: The Uncertain State of Current Federal Law

Unlike the district court in *Capacchione '99*, neither of the two Fourth Circuit panels that heard and decided these related appeals was willing to hold that "diversity of a student body" is *not* a compelling state interest. The *Tuttle* panel explained that "[t]his question remains unresolved" for three reasons.[237] First, only the Fifth Circuit in *Hopwood* had definitively addressed the issue. Second, all cases examined by *Tuttle* were distinguishable because they had focused on programs designed to remedy past

234. *See id.*

235. *See id.* at 125 n.2. Montgomery County had voluntarily desegregated its racially segregated school system in the 1970s. In 1981, a parent complained to the Office of Civil Rights (OCR) of the Department of Education that the board was allowing certain schools to become racially isolated. Although the complaint never resulted in any executive or judicial action, the transfer policy challenged in *Eisenberg* was instituted in response to that 1981 OCR complaint. *See id.*

236. *See id.* at 128 (citing Eisenberg v. Montgomery County Pub. Sch., 19 F. Supp. 2d 449, 453–54 (D. Md. 1998)).

237. Tuttle v. Arlington County School Board, 195 F.3d 698, 704 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000).

discrimination. Third, "[t]he only applicable Supreme Court precedent is Justice Powell's concurrence in *Bakke*, where Justice Powell wrote that diversity 'furthers a compelling state interest.' "[238] The *Tuttle* panel therefore went on to "assume, without so holding, that diversity may be a compelling governmental interest."[239]

The *Eisenberg* panel made a similar assumption, although somewhat more reluctantly.[240] *Eisenberg*, however, refused to accept

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238. *Id.* at 705. The *Tuttle* panel noted that the Fourth Circuit had previously interpreted *Bakke* to hold that a "state 'is not absolutely barred from giving any consideration to race' in a non-remedial context." *Id.* at 705 (quoting Talbert v. City of Richmond, 648 F.2d 925, 928 (4th Cir. 1981)).

One circuit judge, writing in a dissenting opinion, purported to identify six circuits that "have definitively held that racial classifications may only be used for the purpose of remedying racial discrimination." Hunter *ex rel.* Brandt v. Regents of Univ. of Cal., 190 F.3d 1061, 1070–71 (9th Cir. 1999) (Beezer, J., dissenting) (citing Contractors Ass'n v. City of Philadelphia, 91 F.3d 586, 596 (3d Cir. 1996); Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996); Aiken v. City of Memphis, 37 F.3d 1155, 1162–63 (6th Cir. 1994); *In re* Birmingham Reverse Discrimination Employment Litig., 20 F.3d 1525, 1544 (11th Cir. 1994); O'Donnell Const. Co. v. District of Columbia, 963 F.2d 420, 424 (D.C. Cir. 1992); Podberesky v. Kirwan, 956 F.2d 52, 56 (4th Cir. 1992)). A careful review of these cases, however, substantiates the *Tuttle* panel's more cautious assessment.

239. *Tuttle*, 195 F.3d. at 705. The version of the opinion that originally appeared on September 24, 1999 and was reported by electronic reporting services contained one significant footnote (denominated as footnote 10) that was later omitted in a "corrected opinion" filed on November 1, 1999. In the original version, after announcing that the panel would "assume, without so holding, that diversity may be a compelling governmental interest," *id.* at 705, the panel added the following as footnote 10:

> Although we leave the question of whether diversity is a compelling state interest unanswered, we observe that the diversity sought by the School Board in the present case is distinguishable from the diversity sought in previous cases. Unlike previous cases which concerned diversity in higher education or employment, this case concerns diversity in public elementary schools. *See, e.g., Bakke*, 438 U.S. at 311–12 (Powell, J., concurring) ("the attainment of a a diverse student body . . . clearly is a constitutionally permissible goal *for an institution of higher education*") (emphasis added); *Hayes*, 10 F.3d at 213 (stating that the court for not deciding "whether achieving a greater racial diversity *within the police department* is a compelling state interest that might justify awarding promotions on the basis of race") (emphasis added); *see also* Note, *The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 Harv. L. Rev. 940 (1999).

Id. (4th Cir. Sept. 24, 1999), *available at* <http://laws.findlaw.com/4th/ 981604p.html> (copy on file with *North Carolina Law Review*).

This omitted footnote 10 appears to underscore a potential constitutional distinction between the higher education or employment context, on the one hand, and the elementary and secondary school context on the other. (It is unclear whether Judge Ervin—to whom the per curiam opinion is attributed in the opening footnote, *see* 195 F.3d at 700 n.1 (stating that "[t]he opinion in this case was prepared by Judge Ervin, who died before it was filed")—acquiesced in the removal of footnote 10 before his death).

240. *See Eisenberg*, 197 F.3d at 130 (emphasizing that "[n]o inference may here be taken that we are of the opinion that racial diversity is a compelling governmental

the Montgomery board's contention that it had a second compelling interest—"avoiding racial isolation" of its schools.[241] Following a recent New York district court decision[242] (that has since been vacated and remanded on appeal),[243] the *Eisenberg* panel insisted that "despite the different nomenclature," this interest was "one and the same" as that in racial diversity.[244]

The *Eisenberg* panel took one other position that deserves special note. At the outset of its analysis, it faulted the district court for failing to "adhere to, or even to mention, the presumption against race based classifications," adding that "Montgomery County was burdened with this presumption, and although the district court analyzed the transfer policy under strict scrutiny review, it failed to take the presumption into account when it denied [the student's] request for a preliminary injunction. *There is nothing in the record to overcome this presumption.*"[245] The remark is baffling. Never before has the Supreme Court (or any circuit or district court to my knowledge) suggested that, in addition to surmounting the formidable barriers erected by the strict scrutiny test—proof of both a compelling governmental interest and a narrowly tailored means—a state actor

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interest").

241. *Id.* at 130.

242. *See* Brewer v. West Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d 619, 627 (W.D.N.Y. 1999).

243. *See* Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000) (vacating the district court's injunction and remanding for a full trial with the strong suggestion that the district's goal of ending racial isolation because of residential segregation may constitute a compelling state interest).

244. *Eisenberg*, 197 F.3d at 130. The Montgomery County school board had adopted the transfer policy, at least in part, to forestall complaints from minority parents that some schools in the district were becoming racially isolated under the school board's voluntary desegregation plan. Indeed, a letter, dated February 28, 1981, from the United States Department of Education (DOE) to the Montgomery County Superintendent, recited the DOE's understanding that the school board would allow transfers, " 'providing that the transfer does not adversely affect the racial balance in either the sending or the receiving school.' " *Id.* at 131 (quoting the DOE letter). To suggest that a state policy prompted by the threat of adverse federal executive action is "one and the same" as a voluntary policy to encourage student diversity misses an essential difference in the motivations of the two.

The collapsing of the two distinct interests may not matter in this instance, however. The Supreme Court held in *Miller v. Johnson*, that it would *not* accept as "compelling" for Equal Protection Clause purposes Georgia's decision to comply with certain redistricting mandates prescribed by the United States Department of Justice under section 5 of the Voting Rights Act. *See* 515 U.S. 900, 922 (1995). The Court reasoned that the judicial branch had an independent constitutional obligation to assure that states do not violate the Equal Protection Clause and that to suggest that federal executive agency mandates create a "compelling state interest" could impermissibly insulate states' race-base classifications from judicial review. *Eisenberg*, 197 F.3d at 130.

245. *Eisenberg*, 197 F.3d at 128–29 (emphasis added).

must overcome yet a third barrier, "the presumption against race based classifications," which apparently can be overcome only by the proffer of some unstated quantum of evidence. Whether this statement actually represents an innovation in Equal Protection jurisprudence within the Fourth Circuit or was meant instead as an emphatic reminder of the seriousness with which district courts should undertake strict scrutiny review is unclear.

C. *The Errant Search for "Narrowly Tailored Means" to Implement Diversity Ends*

While both Fourth Circuit panels assumed that the school boards had implemented their policies to further a compelling interest in educational diversity, they concluded, nonetheless, that the policies failed strict scrutiny because they were not narrowly tailored. In determining whether Arlington County's means were sufficiently narrow, the *Tuttle* panel looked to the five "narrow tailoring" criteria identified by the Supreme Court in *United States v. Paradise*[246] and employed by the Fourth Circuit in *Hayes v. North State Law Enforcement Officers Ass'n*:[247]

> (1) the efficacy of alternative race-neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties.[248]

The court assessed Arlington's assignment policies in light of each of these five factors. The *Tuttle* court began its search for more narrowly tailored alternatives by agreeing with Justice Blackmun's observation in *Bakke* that " 'the judiciary ... is ill-equipped and poorly trained ' " to evaluate " '[t]he administration and management of educational institutions.' "[249] Then, with a sense of evident relief, the panel noted that a local school committee, charged by the Arlington school board to study admissions policies, had already identified at least one alternative race-neutral policy. At that point,

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246. 480 U.S. 149, 171 (1987).

247. 10 F.3d 207, 216 (4th Cir. 1993) (citing United States v. Paradise, 480 U.S. 149, 171 (1987)).

248. Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000) (quoting *Hayes*, 10 F.3d at 216 (1993)).

249. *Id.* (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 404 (1978) (Blackmun, J., concurring in part and dissenting in part)).

the panel cut short its analysis, concluding that the committee's alternative proposal "demonstrate[d] that the School Board ha[d] race-neutral means to promote diversity," and, therefore, that the board's chosen policy was not sufficiently narrowly tailored.[250]

The *Tuttle* panel stopped too soon; in *Paradise*, the Supreme Court made clear that when pursuing this first "efficacy" prong of the "narrow tailoring" requirement, a court's analysis is not over after it identifies another possible means of meeting the state actor's compelling end. A court must also "examine the purposes the [challenged school policy] was intended to serve" and determine whether alternatives means would equally or better serve those purposes.[251] Indeed, in *Paradise* itself, the Supreme Court rejected arguments by the State of Alabama that other proposed alternatives would suffice, finding them "inadequate because [they] failed to address" some of the compelling ends identified in the opinion.[252] Moreover, the *Paradise* Court admonished that it had not "in all situations 'required remedial plans to be limited to the least restrictive means of implementation .... [T]he choice of remedies to redress racial discrimination is "a balancing process." ' "[253] Significantly, the *Tuttle* court failed to carry out this required second "balancing" step of the "efficacy" analysis, assuming instead that the mere identification of *some* alternative to the Arlington school board's chosen policy would be sufficient.

The *Tuttle* panel next considered the "planned duration of the [p]olicy" instituted by the Arlington school board.[254] Quoting Justice O'Connor's opinion in *Croson*, the court first proposed as an

250. *Id.* at 706 & n.11. In footnote 11, the panel recited the alternatives that had been mentioned by the school committee, but it made no independent assessment of their effectiveness in promoting diversity.

251. *Paradise*, 480 U.S. at 171–73.

252. *Id.* at 172.

253. *Id.* at 184 (quoting Fullilove v. Klutznick, 448 U.S. 448, 508 (1980) (Powell, J., concurring) (quoting Franks v. Bowman Trans. Co., 424 U.S. 747, 794 (1976) (Powell, J., concurring in part and dissenting in part))); *see also* Boston's Children First v. City of Boston, 62 F. Supp. 2d 247, 259 (D. Mass. 1999):

> Assuming that diversity can be a compelling interest, ... determining whether the Plan at issue is narrowly tailored to accomplish it pivots not merely on the fact that race is used in a school plan, but how it is used, in what settings, for what purposes, whether it is race conscious or race preferential, whether it involves an examination school (or a college or law school) for which there are significant qualifications, or an elementary school, for which there are not, whether the use of race excludes entirely or simply affects the distribution of a benefit, whether it is flexible, etc.

Id.

254. *Tuttle*, 195 F.3d at 706.

invariable rule that "a racial classification cannot continue in perpetuity but must have a 'logical stopping point,' " and then concluded that the Arlington policy was not narrowly tailored because it was of indefinite duration.[255] Once again, the Fourth Circuit avoided careful reflection on the purpose of the criterion, which teaches that a federal court must take seriously *both* the importance of the state's ends and the tailoring of its means. As the panel put it in *Hayes*, "the use of racial preferences must be limited so that they *do not outlast their need.*"[256] In *Croson* (as well as in *Hayes* and *Paradise*, the other two cases cited by the panel), the end was the remediation of prior discrimination, and the most effective means were temporary quotas to bring the contracting, promotion, and hiring numbers back into racial parity. When temporary means are in order, a court may logically insist upon some stopping place.

The Arlington school board's compelling interest, on the other hand, was to create a diverse student population in each school, not for remedial purpose, nor to reward or punish any student, but because the board believed that diversity is an indispensable means to adequately educate all children in a heterogeneous, multi-racial nation. That need is not short-term but long-term, extending at least as long as different races and ethnic groups maintain any separate cultural and social identity.[257] The Fourth Circuit's conclusion that the Arlington policy was not narrowly tailored because it lacked a short-term "sunset clause" failed to take seriously the distinctive and important nature of the state's interest. In sum, when considering race-conscious ends that are *remedial*, a fixed duration makes good sense. But in meeting non-remedial, prospective ends—such as creating racially diverse classrooms—insistence upon a fixed duration makes no sense.[258]

The third consideration, one that seemed important to the *Tuttle*

255. *Id.* (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989)).

256. Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 216 (4th Cir. 1993) (emphasis added).

257. *See* WILKINSON, *supra* note 22, at 303–04 (commenting with approval on Justice Powell's choice of diversity as the "most acceptable public rationale" in *Bakke*, contrasting its forward-looking perspective with remedial or compensatory rationales, and observing that, at least in education, "the need for diversity will continue forever, as long as race matters to men").

258. The panel acknowledged that " 'these factors are particularly difficult to assess where, as here, the Policy is not tied to identified past discrimination.' " *Tuttle*, 195 F.3d at 706 (quoting *Hayes*, 10 F.3d at 216 n.8). Yet it did not take the next step to distinguish when the non-remedial setting should make a difference in deciding whether and how the factors should be applied.

panel and was all but dispositive for the *Eisenberg* panel,[259] is the notion that "what drives the entire ... process ... is racial balancing."[260] For the *Tuttle* panel, that identification alone seemed enough to condemn the Arlington policy without further analysis or citation. In comparison, the *Eisenberg* panel did cite several cases that purportedly condemned racial balancing, including *Pasadena City Board of Education v. Spangler*[261] and *Freeman v. Pitts*.[262] Yet those prior cases did not condemn racial balancing generally, but only racial balancing ordered *by federal courts*. As noted earlier, *Swann* distinguished between the limited authority of federal courts to order racial balancing as a remedy for a proven constitutional violation and the "broad power" of school boards not under court supervision "to formulate and implement educational polic[ies that] might well [include] ... a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole."[263] Thus, the Fourth Circuit once again mischaracterized crucial precedents.[264] The proposition that federal courts are not *permitted* to order racial balancing and the collateral proposition that school authorities are not *required* to do so provide no logical support for the panel's conclusion that school authorities are *forbidden* to adopt a racial balancing plan.

The *Eisenberg* panel's reliance upon *Freeman v. Pitts* is likewise misplaced. *Freeman* held that federal courts cannot order judicial remedies if racial imbalance in a district is the result of "private choices" and demographic shifts.[265] *Freeman* did not, however,

259. *See* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 131 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000) ("[W]e find that [the Montgomery County transfer policy] is mere racial balancing in a pure form."); *id.* at 133 ("In *Tuttle* ... and *Podberesky v. Kirwan* ... we ... held that racial balancing was not a narrowly tailored remedy.").

260. *Tuttle*, 195 F.3d at 707; *Eisenberg*, 197 F.3d at 131–32.

261. 427 U.S. 424, 436 (1976).

262. 503 U.S. 467, 497–98 (1992).

263. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

264. Careful review reveals that *Spangler* relied heavily upon *Swann*'s language and reasoning. On the specific page of *Spangler* to which the *Eisenberg* panel cited, the Supreme Court noted only that " '[n]either school authorities nor district courts are constitutionally *required* to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished.' " *Eisenberg*, 197 F.3d at 132 (citing *Spangler*, 427 U.S. at 436 (quoting *Swann*, 402 U.S. at 31–32) (emphasis added)).

265. The *Eisenberg* panel quoted Justice Kennedy's opinion in *Freeman* for the proposition that racial imbalance that is the product of "private choices ... does not have constitutional implications." 197 F.3d at 132 (quoting *Freeman*, 503 U.S. at 495). The very next sentence in *Freeman*, however, clarifies that the Court was addressing the limits of judicial authority and did not purport to limit school board discretion. The quotation in full reads: "Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. *It is beyond the authority and beyond the*

purport to address or limit the authority of school boards themselves to address those imbalances if they choose to do so voluntarily.

The *Tuttle* panel turned next to the fourth of its five "narrow tailoring" factors: the flexibility of the district's race-conscious policy.[266] The panel compared Justice Powell's comment approving Harvard's use of race as merely a "plus" factor in reviewing its application plan—when the school was still "treat[ing] each applicant as an individual"—with his disapproving comment on the University of California at Davis Medical School admissions plan, which, like the Arlington weighted policy, did "not treat applicants as individuals."[267] The difference between *both* the Harvard plan and the University of California at Davis plan on the one hand, and the Arlington weighted lottery on the other, however, is that the former plans are designed for institutions of higher education which must regularly sort among thousands of potential applicants, each of whom hopes to become one of a very few accepted for admission, while the latter plan, the Arlington lottery, allocates students to elementary and secondary schools with the assurance that all children will receive an educational opportunity. A public university's failure to consider an applicant's high school or undergraduate grades, her recommendations, her extra-curricular activities, or her standardized test scores, might implicate both Equal Protection and Due Process Clause concerns. By contrast, elementary school students are *not* routinely "treated as individuals" when being assigned to public schools. There is normally no pretense that particular students' abilities or interests are weighed or evaluated. Traditionally, residential location has dictated the school a student attends. District lines are adjusted every few years, often by dividing streets and neighborhoods in ways that would be judged truly arbitrary if assessed in terms of the needs or interests of each child on each street. Yet because school districts promise a system of common public schools, available to all, their schools are legally fungible, and students are deployed to different schools at the discretion of the school board.[268]

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practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts." *Freeman*, 503 U.S. at 495 (emphasis added).

266. *See* Tuttle v. Arlington County Bd. of Educ., 195 F.3d 698, 707 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000).

267. *Id.*

268. *See* MD. CODE. ANN., EDUC. § 4-109(c) (1999) (authorizing the school board to "determine the geographical attendance area for each school"); VA. CODE ANN. § 22.1-79 (Michie 2000) (authorizing the school board to provide for "redistricting of school boundaries and to adopt pupil assignment plans"); *see also* Borders v. Board of Educ., 290 A.2d 510, 514 n.1 (Md. 1972) (acknowledging that the then-current statute, MD. ANN.

Of course, if a school board institutes a public *merit* school for students with exceptional needs or abilities, it normally undertakes individualized consideration of potential applicants, and the concerns voiced in *Bakke* begin to outweigh the school board's need for unilateral authority. Neither *Tuttle*'s weighted lottery plan for magnet schools nor *Eisenberg*'s transfer plan, however, purported to assess individual merit.

The final factor the *Tuttle* panel considered was "the burden on innocent third parties" whom the panel depicted as "young kindergarten-age children."[269] The panel found it ironic that the Arlington board "seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups [and yet it] classifies those same children as members of certain racial and ethnic groups."[270] I contend that the Arlington board's policy created no such irony. What students learn from each other when they arrive at school is neither limited to, nor constrained by, the considerations that have brought them together. Schools may, and do, deliberately mix together students with different characteristics, including academic ability, gender identity, and family background. The use of these categories in assigning students does not lead students invariably to think of other students only in the categories used to conjoin them. When assigning students to school, school boards regularly consider what mix of students might create the best or most balanced learning environment. In fact, schools have considered such questions at every academic level from time immemorial. It is simply not true that the deliberate use of racial classifications will necessarily lead students to think of their classmates only in racial or ethnic terms.

After completing its review of the five "narrow tailoring" factors, the *Tuttle* panel struck down the policy because it was not narrowly tailored to further diversity.[271] The *Eisenberg* panel's conclusion was

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CODE art. 77, § 42 (1957), empowered "the county board of education . . . [to] determine the geographical attendance areas for all such schools" and therefore rejecting a challenge by parents who argued that redrawing attendance lines was impermissible. The decision declared that the "courts will not attempt to substitute their judgment for the expertise of school boards, acting within the limits of the discretion entrusted to them."). The court in *Borders* relied upon the Annotated Code of Maryland, article 77, section 42 of 1957, which was subsequently repealed and re-enacted in 1996 and is now codified as Maryland Code Annotated, Education section 4-109(c). The successor statute is substantively the same as the earlier one relied upon in *Borders*; it simply re-authorizes the school board to determine the geographical attendance zones for each school.

269. *Tuttle*, 195 F.3d at 707.

270. *Id.*

271. *See id.* The panel did consider and vacate the injunction entered by the district

more expansive. It literally locked the schoolhouse door to future use of a student's race within the Fourth Circuit and threw away the key:

> Montgomery County's transfer policy ... is engaging in racial balancing, which we have just held to be unconstitutional in *Tuttle*. In *Tuttle* ... and *Podberesky v. Kirwan* ... we also held that racial balancing was not a narrowly tailored remedy. Therefore, ... the complained of action on the part of Montgomery County [must] be invalidated because it [gave] effect to an unconstitutional policy.[272]

Beyond the panels' imperfect reliance upon the five "narrow tailoring" factors—some misapprehended, others misapplied, and still others inapplicable in the school diversity context—the more fundamental failure of the Fourth Circuit was its neglect of the deeper questions about narrower tailoring. An adequate judicial analysis would require serious attention to the tailoring of a school board's policy, not in the abstract, but in relation to the concrete state ends the court has already deemed compelling. Thus, narrow tailoring analysis requires consideration of two compound questions: (1) What is compelling about this particular choice, and why has the state deemed the classification to be necessary? and (2) Who, if anyone, will be injured by this choice, and has the state attempted to minimize such injuries to the fullest extent compatible with achieving its compelling interest?

The two Fourth Circuit panels, after reluctantly assuming that school diversity was a compelling interest, grudgingly conducted "narrow tailoring" reviews. Yet if achieving diversity in local school populations is a valid (a legitimate, an important, even a *compelling*) governmental interest, why can school boards not proceed to implement that end in the most direct and logical way—by assigning children to assure that every school will reflect racial and ethnic diversity? The Fourth Circuit's best answer or non-answer seems to be that school boards may achieve racial diversity if they do so *indirectly*, relying on non-racial assignment factors.

Yet that answer betrays an underlying conceptual misunderstanding. If a school board does employ other, non-racial

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court, holding that, rather than requiring a particular alternative assignment policy, "[t]he district court should have taken the less intrusive step of continuing to monitor and review alternative programs proposed by the School Board" during an evidentiary hearing. *Id.* at 708.

272. Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 133 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000).

factors but fails to achieve racial and ethnic diversity in its schools (or indeed, in any one school), may it try again? One who answers no must explain why a state interest, admittedly compelling, can nonetheless be thwarted. It is untenable for federal courts to recognize a state interest as compelling, yet refuse to allow the state sufficient means to achieve it. On the other hand, if school boards *may* try again, presumably they may be permitted to try a succession of methods, one after another, until they find one that succeeds in achieving racial diversity. Repeated tries and misses would, however, raise the specter of *Washington v. Davis*,[273] for such school boards' actions, although facially neutral, would obviously be taken with the intent to bring about a race-specific end. Yet this brings us full circle, for if a school board may permissibly adopt and seek school diversity as a race-conscious goal, why is it impermissible to take the direct route rather than insist upon an administratively cumbersome, analytically dubious, indirect path?

The best, though unsatisfying, answer may be the Supreme Court's frequently expressed concern to avoid loss to innocent parties to the fullest extent possible. Indeed, the panel opinions voice precisely this concern. But a school board may persuasively reply that when distributing not a scarce resource but a common good—when its assignments are made not to the most meritorious, or the lowest bidder, or the most reliable company, but to all—that there simply *are* no victims in the sense that understandably has troubled federal courts in zero-sum-game contexts.

Was plaintiff Grace Tuttle disappointed when she was denied attendance at the Arlington Traditional School? Was Jacob Eisenberg frustrated when his application to a math and science magnet first grade was unsuccessful? Of course they were. But every autumn, hundreds of thousands of parents and their children are similarly disappointed and frustrated when they learn that their children have been assigned to public schools not of their hearts' desire. Yearly adjustments to school attendance zones are made for a wide variety of reasons, and boards dispatch children to new and unfamiliar schools that cause apprehension and dissatisfaction to parents and children alike. Neither federal nor state laws, however, recognize the troubled parents or the fearful students as legal victims

273. 426 U.S. 229, 239–42 (1976). In *Davis*, the Supreme Court held that "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." *Id.* at 241. For a school board repeatedly to readjust its assignment policies, using racially neutral criteria, but with the admitted intent and objective of achieving a desired racial balance, would appear to contravene the *Davis* principle.

with rights to vindicate or losses that entitle them to seek compensation. No principles of constitutional law or of education law recognize a cognizable, vested liberty or property interest in attending any particular elementary or secondary school.[274]

Nevertheless, the Fourth Circuit implicitly concluded that although a school board may deny a child admission to a magnet school for an arbitrary reason ("we've just redrawn the school boundary line two doors north of your house"), the board may not deny the child admission for a racial reason. Such a conclusion, however, does not honestly acknowledge school diversity as a compelling end. Whether pursued by direct or by indirect means, once school diversity is deemed a compelling end, some children must necessarily be reassigned with race or ethnicity in mind if a school board is permitted to achieve that end.

The Fourth Circuit's express disapproval of school boards' resort to direct means of achieving student diversity and its implicit approval of indirect means toward the same end does not distinguish meaningfully between what is "narrower" and what is "broader." It is irrational to suggest that, while school diversity (accidentally achieved through non-racial assignment policies) is a compelling interest, a school board must not adopt conscious means to achieve educational diversity, at least until its judgment has been second-guessed by a federal court.[275]

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274. *See generally* LEROY J. PETERSON ET AL., THE LAW AND PUBLIC SCHOOL OPERATION § 11.6, at 333–34 (1968) (stating that the school board is not required to assign a child "to the nearest school or the school most conveniently located," nor will a court "compel reassignment to the school selected by the parents"); 3 JAMES A. RAPP, EDUCATION LAW § 8.02[8], at 8–64 (1999) ("There is no constitutional right to a particular placement. A student does not have a proprietary interest in where the student receives an education. Students do not have a right to ... a particular school."); 1 WILLIAM D. VALENTE, EDUCATION LAW: PUBLIC AND PRIVATE § 9.2, at 138–39 (1985) ("The discretion vested in local school boards to assign students to particular schools is limited only by the rules against abuse of discretion and special circumstances .... Absent constitutional compulsion or state legislation that mandates neighborhood school assignments, students have no general right to be assigned to a neighborhood school.").

275. That suggestion actually appears to be the thrust of the *Eisenberg* panel's remarks about "racial balancing." Those remarks raise interesting questions that I will not explore here. If *some* racial diversity can be compelling, but racial balancing (creation of schools that reflect the overall demographic variety of the school district) is *forbidden*, how much diversity is it lawful for a school board to create? What would be an unacceptably low degree of diversity, one which would justify school board reassignment? How much reassignment would be too much, constitutionally speaking? Such dubious calculus is reminiscent of the long-discredited position of a three-judge panel within the Fourth Circuit that interpreted *Brown* not to require integration, but only minimal desegregation. *See* Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (per curiam) (declaring that "[t]he Constitution ... does not require integration. It merely forbids discrimination.").

IV. SCHOOL ASSIGNMENT ALTERNATIVES IN THE AFTERMATH OF *TUTTLE*, *EISENBERG*, AND *CAPACCHIONE*

This Article has contended that *Tuttle*, *Eisenberg*, and *Capaccione* are neither fully faithful to Supreme Court precedent, nor are they fully consistent with the logic of the modern affirmative action cases such as *Croson* and *Adarand* on which they purport to rely. Hence, one option appropriate for any school board is to wait until after the Supreme Court has addressed these issues before taking any steps at all.

Although the Supreme Court has denied certiorari in *Tuttle* and *Eisenberg*,[276] it must eventually address and resolve the two key constitutional issues they present: (1) whether enhancing racial and ethnic diversity in a public school's student population is a compelling interest; and (2) if so, what means are sufficiently "narrowly tailored" to meet that end.[277]

But see Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 200–01 n.11 (1973) (noting that the *Briggs* view of *Brown* was necessarily repudiated by the Court's decision in *Green v. County School Board*, 391 U.S. 430, 437–38 (1968)).

276. Although the Supreme Court denied certiorari in the *Eisenberg* case on March 20, 2000, *see* Montgomery County Pub. Sch. v. Eisenberg, 120 S. Ct. 1420 (2000), and dismissed the petition for certiorari in *Tuttle* on March 28, 2000, *see* Tuttle v. Arlington County Sch. Bd., 120 S. Ct. 1552 (2000), the Court has long cautioned the bar that its decision *not* to grant certiorari can come for many reasons unrelated to the merits, and that lawyers should never conclude from a denial of certiorari that the Court implicitly has approved either the lower court's opinion or its judgment in the case under consideration. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 85 (1995) (noting that "[o]f course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times' " (quoting United States v. Carver, 260 U.S. 482, 490 (1923))). *See generally* ROBERT L. STERN, EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 5.7, at 239 (7th ed. 1993) (clarifying the limited significance of denials of certiorari and citing the Court's precedents to support the point).

277. The *Tuttle* panel correctly noted that the diversity issue had not been resolved; it is looming, however, in various cases that either have been recently decided or are currently working their way through the federal circuits. *See, e.g.*, Hunter *ex rel.* Brandt v. Regents of Univ. of Cal., 190 F.3d 1061, 1063 (9th Cir. 1999) (upholding use of race and ethnicity as compelling considerations in the selection of students for a research elementary school associated with the UCLA's Graduate School of Education); Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 864–65 (9th Cir. 1998) (remanding for a trial on whether the use of race and ethnicity are still justified in overcoming vestiges of prior de facto discrimination in San Francisco public schools, but expressing a narrow view of permissible uses of race-conscious policies outside a remedial context); Wessmann v. Gittens, 160 F.3d 790, 796–809 (1st Cir. 1998) (holding that Boston had not demonstrated a compelling interest in using race to override its reliance upon competitive examination scores to use race in assigning students to a merit school); Hopwood v. Texas, 78 F.3d 932, 951 (5th Cir. 1996) (holding that race and ethnicity may not be considered in the admissions process at the University of Texas Law School, because "non-remedial state interests will never justify racial classifications"); Brewer v. West Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d 619, 620 (W.D.N.Y 1999) (granting a preliminary injunction to

A. *What These Cases Hold*

The educational world is now divided into two parts. As *Capacchione* demonstrates, school districts that currently operate under a federal court's desegregation order continue to be subject to *Swann*, *Green*, and the more recent case law of *Dowell*, *Freeman*, and *Jenkins III*. Alternatively, school districts in the Fourth Circuit not under desegregation decrees must accommodate themselves to the brave new world of *Tuttle* and *Eisenberg*.

1. School Districts Currently Under Desegregation Orders

Districts operating under desegregation orders were authorized long ago to make race-conscious student assignments in furtherance of their "affirmative duty" to end racially-dual school systems. School boards may, indeed must, follow whatever race-conscious remedies were authorized by earlier federal decrees until their districts have been declared unitary and released from federal supervision.

If no party objects to a school board's race-conscious current practices, the board has no affirmative obligation to alter the status quo. If the board decides, however, that it wishes to have its district declared unitary, it must come forward with a motion for relief, and it must be prepared to prove that it can satisfy the three *Freeman* factors: (1) that the school board has "full[y] and satisfactor[ily] compli[ed] with the decree," (2) that "the vestiges of past discrimination have been eliminated to the extent practicable," and (3) that "the school district has demonstrated ... its good-faith commitment to the whole of the court's decree and to those provisions of the law and Constitution that were the predicate for

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parents of white city school student who alleged that school board's use of race to exclude their daughter from participation in a two-way transfer program—only minority-race students could transfer from city schools to suburban schools, and only non-minority-race students could transfer from suburban schools to city schools—violated the Equal Protection Clause), *vacated and remanded*, 212 F.3d 738 (2d Cir. 2000); Martin v. School Dist. of Philadelphia., No. 95-5650, 1995 U.S. Dist. LEXIS 13861, at *2-3 (E.D. Pa. 1995) (distinguishing between "race-conscious" and "race preferential" programs and holding that the goal of "ensuring equal educational opportunities across racial lines" is a compelling interest that will justify employing a 65% to 35% black to white ratio in implementing a student transfer policy); Jacobs v. Independent Sch. Dist. No. 625, No. 99-CV-542 (D. Minn. filed Apr. 6, 1999) (challenging the use of race in assignment to St. Paul magnet schools); Scott v Pasadena Unified Sch. Dist., No. CV99-1328 (C.D. Cal. filed Jan. 22, 1999) (challenging a student assignment policy that considers race, color, national origin, ethnicity, and gender); Cowan v. Charleston County Sch. Dist., No. 2:97-2493-08 (D.S.C. filed Aug. 20, 1997) (challenging the use of race in student assignments to magnet schools).

judicial intervention in the first instance."[278]

Districts that have resisted a judicial decree for a period of time, subsequently departed from the decree's terms without court approval, or tolerated schools whose student or faculty populations remain racially identifiable under any of the six *Green* factors—student assignments, faculty assignments, staff assignments, transportation, extra-curricular activities, or school facilities—may well have difficulty shouldering their burden of proof and receiving unitary status. As *Dowell*, *Freeman*, *Jenkins III*, and *Capacchione* all illustrate, however, modern federal courts are increasingly concerned about ending court-supervised desegregation decrees and returning school districts to local control. No plaintiff can be sure that a school district's failure to comply fully with a desegregation decree, to eliminate all vestiges of segregation, or to have acted in good faith in its post-decree conduct will assure continuing federal supervision or continuing justification for race-conscious remedies.[279]

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278. *Jenkins*, 515 U.S. at 89; *see also* Freeman v. Pitts, 503 U.S. 467, 491–93 (1992) (setting forth this standard).

279. On the other hand, a number of federal courts have *denied* unitary status to petitioning school boards in recent years, retaining court-ordered jurisdiction pending further judicial review because of perceived failures to end vestiges to the extent practicable. *See, e.g.*, Jenkins v. Missouri, 216 F.3d 720, 727 (8th Cir. 2000) (en banc) (reversing a district court judgment that granted unitary status in long-running Kansas City, Missouri school desegregation suit, and remanding for an evidentiary hearing on whether the school district had taken sufficient steps both to implement student achievement goals and to eliminate an achievement gap between white and black students in the district); United States v. Georgia, 171 F.3d 1344, 1351 (11th Cir. 1999) (reversing a district court judgment that granted unitary status to the Troup County, Georgia school district in erroneous reliance upon a 1973 court order, and remanding for further proceedings); Liddell v. Special Sch. Dist., 149 F.3d 862, 871–72 (8th Cir. 1998) (affirming the district court's finding that the school system has not achieved full unitary status because it had failed to act in good faith in desegregating the city's vocational education facilities); Morgan v. Burke, 926 F.2d 86, 89 (1st Cir. 1991) (affirming the district court's denial of unitary status because of inequities in assigning black faculty and administrative staff); Lee v. Autauga County Bd. of Educ., 59 F. Supp. 2d 1199, 1203 (M.D. Ala. 1999) (noting that the school board was still bound by a 1997 consent decree finding that it has achieved unitary status with respect to transportation, physical facilities, discipline, equity in salary but that it had not achieved unitary status in the areas of faculty, staff, curriculum, majority-to-minority transfers, and student achievement); Manning v. School Bd., 24 F. Supp. 2d 1277, 1334 (M.D. Fla. 1998) (concluding that despite the general obligation for federal courts to restore local control to school boards promptly, "there is more work to be done" in desegregating the Hillsborough County district, and thus judicial "supervision remains necessary"); Valley v. Rapides Parish Sch. Bd., 960 F. Supp. 96, 101 (W.D. La. 1997) (holding that the school district had not yet attained unitary status because it still had racially identifiable schools in three wards within the district), *vacated and remanded on other grounds*, 145 F.3d 329, 334 (5th Cir. 1998); Stanley v. Darlington County Sch. Dist., 879 F. Supp. 1341, 1414–15 (D.S.C. 1995) (denying unitary status because the school system still had racially identifiable schools, faculty assignment

The Charlotte-Mecklenburg school district offers a prime example of the federal courts' more lenient, post-*Freeman* disposition. In the early 1990s, the board unilaterally departed from a court-ordered assignment plan in favor of greater reliance on magnet schools and other more flexible assignment devices. Moreover, the *Swann* plaintiffs identified a number of *Green* areas in which continuing vestiges of former segregation could be discerned. Indeed, the school board agreed with the plaintiffs' criticisms and offered to implement a new "controlled choice" plan to achieve greater student desegregation. The district court nonetheless declared the district unitary, dissolved the former decree, and ended federal supervision.

2. School Districts *Not* Currently Under Desegregation Orders

The principal legal changes forecast by *Tuttle*, *Eisenberg*, and *Capacchione* involve schools that have never operated under a desegregation order (such as the defendant school board in *Eisenberg*), as well as those declared unitary and released from judicial supervision.

a. The Specific Practices Condemned by *Tuttle*

As we have seen , the *Tuttle* panel held that the deliberate use of race or ethnicity in making school assignments is not sufficiently narrowly tailored to survive "strict judicial scrutiny" under the Equal Protection Clause.[280] The *Tuttle* court did look with apparent favor on three alternative means of achieving student diversity that had been identified by an Arlington schools admission study committee—all of which it expressly designated as "race-neutral policies."[281] Under the first alternative, the board could "assign a small geographic area ... as the home school [sic] for that [geographic] area, and fill the remaining spaces ... by means of an unweighted

procedures, and busing plans that were too burdensome on the black community), *rev'd on other grounds,* 84 F.3d. 707, 717 (4th Cir. 1996).

280. The policy's flaw, according to the court, was its "reli[ance] upon [nonremedial] racial balancing." Tuttle v. Arlington County School Board, 195 F.3d 698, 705 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000). The panel rejected the Arlington school board's distinction that this policy was different from others previously held unconstitutional because, under this policy, no particular percentage was reserved solely for minority group members. *See id.* at 707. The panel explained: "Although the Policy does not explicitly set aside spots solely for certain minorities, it has practically the same result by skewing the odds of selection in favor of certain minorities. Even if the final results may have some statistical variation, what drives the entire weighted lottery process ... is racial balancing." *Id.*

281. *See id.* at 706 & n.11.

random lottery from a ... geographic area [that] would presumably be selected so that its residents would positively effect the diversity of the school."[282] Under the second alternative, the board would put the names of every child in the district into a lottery and offer all those randomly selected the opportunity to enter a second lottery comprised of those who would like to attend the particular magnet school. Under this version, no one could initially apply for the school; only those randomly selected would be invited to participate in the selection lottery. Under the third alternative, "[e]ach neighborhood school ... [would receive] a certain number of slots at each alternative school," presumably so it could place some of its own students at the alternative school.[283]

Both the first and the third alternatives rest on the unexamined (but doubtless largely accurate) assumption that different racial and ethnic groups are likely to live in separate neighborhoods—*i.e.*, to experience racial residential segregation—and that therefore, "race-neutral" lotteries that select students from different residential neighborhoods will, in fact, increase student diversity. The panel's approving citation of these alternative measures suggests that a high degree of race-conscious behavior by school districts may be acceptable. Boards apparently may recognize and act in the knowledge of the realities of residential segregation within their district as they fashion school assignments, so long as they act through the medium of neighborhoods and not through the media of individual students and their families.

Some might wonder how intentionally structuring student assignment zones to achieve racial diversity can survive scrutiny under Supreme Court precedents[284] which provide that "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."[285] As suggested in Part III, this apparent inconsistency reflects the panel's underlying confusion about the relationship between student diversity as a compelling state end and the use of racial criteria as a narrowly tailored means.[286] As I noted earlier, if it is legitimate, even compelling, for school boards to seek racial and ethnic diversity as an educational end, it is puzzling why assigning by race directly is *not* an acceptable means, but why

282. *Id.* at 706 n.11.

283. *Id.*

284. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (applying the *Davis* rule); Washington v. Davis, 426 U.S. 229 (1976).

285. *Davis*, 426 U.S. at 241.

286. *See supra* notes 269–71 and accompanying text.

doing so indirectly, though no less deliberately, in reliance upon the racial identity of a segregated neighborhood, is an acceptable means.

One plausible constitutional answer is that a school board's reliance upon the racial composition of neighborhoods does not foreclose a determined parent of any race from making a private choice to leave a segregated neighborhood and go elsewhere. If school authorities do not expressly use race to choose a student's school assignment, parents retain some freedom to avoid unwanted school assignments and the chance to secure special school placements by altering their place of residence—provided they have the financial means and the determination to do so. Viewed from an individual perspective, this approach involves slightly less coercion by state officials; although officials may take the predominant racial characteristics of neighborhoods into account, parents can act within the private sphere to avoid any public assignment based upon their own race or ethnic origin.

b. The Specific Practices Condemned by *Eisenberg*

In *Eisenberg*, the specific practice under scrutiny was the district's use of race in evaluating student requests to transfer to a school other than the one to which the child was initially assigned.[287] Students were normally permitted to transfer to schools where their own racial percentages were underrepresented, unless their departure would adversely affect the racial composition of their transferring school. Conversely, students were normally denied a transfer to schools where their own racial percentages were already overrepresented. Indeed, the Montgomery school board admitted that it normally denied transfer requests solely on the basis of race whenever a transfer would contribute to racial isolation.[288]

The Fourth Circuit condemned this practice as "mere racial balancing in a pure form," and, quoting *Tuttle*, held that " '[s]uch nonremedial racial balancing is unconstitutional.' "[289] The *Eisenberg* panel continued: "Added to the racial balancing is the fact that [the student's] transfer request was refused because of his race. As we have pointed out, such race based governmental actions are presumed to be invalid and are subject to strict scrutiny."[290] Hence, *Eisenberg*

287. *See* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 124 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000).

288. *See id.* at 133.

289. *Id.* at 131 (quoting Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 705 (4th Cir. 1999).

290. *Id.* at 133.

appears to condemn school boards' consideration of race in passing upon individual student transfer requests as well as more general school board efforts to achieve proportionate racial populations in each school.

In sum, *Tuttle* and *Eisenberg* invalidated non-remedial uses of race as a consideration—even one among several—in selecting students for magnet schools, and in approving or disapproving student transfer requests. The panels indicated that it made no constitutional difference whether only black students (or other minority students) or both black and white students were subject to the same sort of policy considerations (in other words, whether the policy embraces racial preferences or instead was "merely" race-conscious).

c. Unresolved Questions

Many questions remain unresolved by the Fourth Circuit's recent decisions. Do these cases forbid all "majority to minority" ("M-to-M") transfer programs, under which school boards normally honor voluntary student requests to transfer if the student seeks a school in which his or her race is in the minority? M-to-M programs differ from the one under consideration in Montgomery County by their absence of any specific racial or ethnic goals or quotas, such as the maintenance of a student population within fifteen percent of the countywide average. In that way, M-to-M programs avoid the "racial balancing," which *Tuttle* and *Eisenberg* treated as almost *per se* unconstitutional.

The prospects for M-to-M programs, however, seem uncertain for two reasons, even though they are not full-fledged racial balancing programs. First, such programs implicitly depend upon some overall quota or balance, since transfers will not be honored if a student's race is identical to that of a majority of the students in the receiving school. Second, M-to-M programs are subject to the same general criticism that the *Eisenberg* panel leveled against the Montgomery County policy, because students "are all subject to being denied a transfer request solely on the basis of their race."[291] To borrow the language of *Tuttle*, any applicants who are denied a transfer on racial grounds might be viewed as "innocent third parties."[292]

Another unresolved question is whether these cases forbid the consideration of race and ethnicity in drawing or readjusting school

291. *Id.* at 129.
292. *Tuttle*, 195 F.3d at 707.

attendance zones. The *Tuttle* court, as noted above, cited with apparent approval three alternative race-neutral school assignment policies that used various constellations of neighborhood and district-wide feeder zones to create schools with diverse student populations.[293] Several of these alternatives could only work to create diversity if school boards are permitted to take into consideration the racial and ethnic composition of the neighborhoods selected for inclusion. Yet it seems implausible to imagine the current Fourth Circuit approving the deliberate "pairing and clustering" of non-contiguous neighborhoods—a practice specifically approved in *Swann*[294]—if the only criterion for designation of the neighborhoods is race.

One source of insight into what is constitutionally permissible may come from the voting rights arena. The Supreme Court acknowledged in *Shaw v. Hunt*[295] that "[a]pplying traditional equal protection principles in the voting-rights context is 'a most delicate task,' . . . because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts."[296] Although Equal Protection Clause challenges to such legislative decisions are ongoing,[297] the most recent and pertinent authority provides that "[t]he constitutional wrong occurs when race becomes the 'dominant and controlling' consideration."[298] School boards can use *Shaw* to insist that they may draw school attendance zones with the knowledge of their racial implications so long as race or ethnicity is not the "dominant and controlling consideration."[299]

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293. *See id.* at 706 n.11.

294. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 27–29 (1971).

295. 517 U.S. 899 (1996).

296. *Id.* at 905 (internal citation omitted).

297. *See id.*; *see also* Hunt v. Cromartie, 120 S. Ct. 2715 (2000) (noting probable jurisdiction to resolve Equal Protection Clause challenge to North Carolina's revised redistricting plan); Bush v Vera, 517 U.S. 952, 962 (1996) (applying strict scrutiny in examining Texas's 1990 redistricting plan); Miller v. Johnson, 515 U.S. 900, 912 (1995) (applying strict scrutiny in examining Georgia's 1990 redistricting plan); United States v. Hays, 515 U.S. 737, 745 (1995) (denying standing to plaintiffs who sought strict scrutiny of Louisiana's 1990 redistricting plan); Shaw v. Reno, 509 U.S. 630, 644 (1993) (applying strict scrutiny in examining North Carolina's 1990 redistricting plan).

298. *Shaw*, 517 U.S. at 905 (quoting *Miller*, 515 U.S. at 905).

299. *Id. See generally* Boston's Children First v. City of Boston, 62 F. Supp. 2d 247 (D. Mass. 1999) (denying plaintiffs' motion for a preliminary injunction against the Boston School Committee's use of race in creating school attendance zones, reasoning that the record was insufficient to determine whether the plaintiffs were likely to prevail on the merits). *But see* Boston's Children First v. City of Boston, 98 F. Supp. 2d 111, 112–14 (D. Mass. 2000) (denying defendants' motion to dismiss plaintiffs' allegations that the Boston School Committee's creation of school attendance zones, based in part on racial considerations, violates the Fourteenth Amendment and other federal and state laws).

Another race-related question unaddressed by *Tuttle* and *Eisenberg* is whether schools may design special programs to assist students of certain races who are having academic difficulties and then assign students to those programs. If a school board has reliable educational data suggesting, for example, that African-American males are experiencing special problems in mathematics, or that Latina females are having difficulty with science, can the board take direct action to address those problems? The answer is unclear. It is certain, however, that to use racial or ethnic classifications, even for educational purposes, a board's policy will need to survive strict judicial scrutiny. In other words, the board must both identify a compelling end and show that its means are narrowly tailored. Most probably, achieving academic success for all children would be accepted as a compelling governmental end. Both *Tuttle* and *Eisenberg* strongly suggested, however, that when non-racial means to achieve such an end are available, they should be tried first. Hence, it may well be incumbent upon school boards to open the admission for such programs to students of all racial and ethnic backgrounds who may be experiencing whatever particular academic difficulties the special programs seek to address.

A recent Ninth Circuit opinion, *Hunter v. Regents of the University of California*,[300] provides some support for the proposition that it is legally permissible to address educational challenges that have a special racial or ethnic dimension. In *Hunter*, a panel, over a strong dissent, upheld a university policy authorizing the use of race and ethnicity in selecting children to attend a public elementary school connected with the University of California at Los Angeles (UCLA) Graduate School of Education. The district court reasoned that the very purpose of the research-oriented graduate school was to address and find educational solutions for the special challenges presented by the "[c]ultural and economic differences" that California's multi-ethnic students bring to California classrooms.[301] The UCLA policy assured that its research school would reflect the state's demographic makeup, an interest the panel found "compelling" under those circumstances.[302] The case is potentially distinguishable from that of most elementary and secondary schools, of course, because the panel placed emphasis on the experimental and research dimensions of the UCLA program. Yet one purpose of

300. 190 F.3d 1061 (9th Cir. 1999).
301. *Id.* at 1064.
302. *See id.*

the UCLA study is to discern whether racially or ethnically tailored academic programs might better serve the educational needs of particular groups of California's children. If UCLA succeeds in fashioning such programs, surely their use would also be compelling. There would be little point in allowing schools of education to conduct research if their race-specific educational findings are barred from use in the public schools despite their promise of educational benefits.

Finally, nothing in *Tuttle* and *Eisenberg* purports to forbid state or local school authorities from continuing to collect data on racial or ethnic issues. Indeed, federal and state statutes require such data. The Fourth Circuit's principal constitutional concern appears to have been with government *treatment* of citizens on racial grounds; governmental collection of data does not imply any subsequent difference in treatment, and therefore, it should not be threatened by these recent decisions.

Tuttle and *Eisenberg* also have likely significance for other race-conscious decision-making by state or local school boards—respecting teacher assignments, staff assignments, and use of curricula, among others. Although this Article confines its analysis to the impact of these cases on student assignment policy, the doctrinal implications of the cases plainly extend further. I will not explore those additional implications except to make the following generalization: The Fourth Circuit is committed to strict judicial scrutiny whenever a plaintiff asserts a challenge under the Equal Protection Clause to state classifications that depend upon race or ethnicity. Under strict scrutiny, federal courts within the Fourth Circuit are likely to demand that any future race-conscious faculty or staff assignments meet some compelling governmental end and are narrowly tailored to further that end. Judicial examination of justifications for race-conscious hiring, assignment, promotion, and layoff policies has a two-decade history in the federal courts[303] implicating not only constitutional concerns but also issues arising under Title VII of the Civil Rights Act of 1964.[304]

303. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283–84 (1986) (invalidating a collective bargaining agreement under which African-Americans were given protection against layoffs beyond those occasioned by their individual seniority); Taxman v. Board of Educ., 91 F.3d 1547, 1550 (3d Cir. 1996) (using Title VII to invalidate a school board's decision to discharge a white teacher rather than a black teacher as part of a faculty-downsizing, which the school board had justified by its interest in promoting a racially diverse teacher corps).

304. *See* 42 U.S.C. § 2000e-2 (1994).

B. Other Courses of Action Open to School Boards

One of the most interesting responses to *Tuttle* and *Eisenberg* has occurred in Wake County, North Carolina. There the school board has voted to end its traditional approach of balancing elementary and secondary schools along racial lines in favor of a new approach, under which it will weigh both family income and student academic performance in making assignments.[305] Under this new plan, students will be assigned with the twin objectives: (1) that no school will have a student population more than forty percent of which is eligible for free or reduced-price lunches (a widely used measure of parents' economic status), and (2) that no school will have a student population more than twenty-five percent of which read below grade level.[306] The board estimated that nineteen of its seventy-four elementary schools and three of its twenty-two middle schools presently fall outside one or both of these criteria, and therefore are subject to student assignment shifts.[307]

This new policy likely will achieve significant racial integration because of the disproportionately high percentage of African-American children who reside in low-income families or who perform relatively poorly on state standardized tests.[308] Nonetheless

> [a]bout 38 percent of Wake [county's] minority students will no longer be automatically targeted for integration ... because they passed the state's year-end reading exams and their families earn enough money so that they are not eligible for free or reduced-price lunches. And about 13 percent of the district's white students, those who either read below grade level or qualify for subsidized lunches, will be among those who could be reassigned to help the schools meet their new, colorblind definition of diversity.[309]

The plan will not "zero in on individual students by reassigning only those who fit the new criteria while leaving others in the neighborhood alone."[310] Instead, the new plan typically will transfer all students in neighborhoods where most of the students are poor or are reading below grade level. Hence some children in those affected neighborhoods will be reassigned even if they have solid reading skills

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305. *See* Silberman, *supra* note 18, at 1A.
306. *See id.*
307. *See id.*
308. *See* Tim Simmons, *School Plan Signals New Chapter in Integration*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 16, 2000, at 1A.
309. *Id.*
310. *Id.*

and are not from poor families.[311]

This approach appears to be a fully constitutional alternative means to achieve diversity. Neither socioeconomic status nor academic skills are "inherently suspect" classifications that normally prompt strict judicial scrutiny.[312] Instead, both are solidly related to a district's overall educational concerns. Individual student performances are obviously germane to such concerns, and reliable academic research has also correlated low socioeconomic status with low educational performance.[313] More recently, research has shown that large increases in a school's percentage of low-income children is associated with lower academic performances among all children within the school. In other words, very high percentages of poor children within a school tend to depress the learning of all students who attend these schools, irrespective of their individual economic backgrounds.[314]

Consequently, school assignments based upon educational and socioeconomic criteria seem rationally related, at a minimum, to the legitimate end of furthering students' academic progress. Such assignment policies should easily pass rational basis judicial scrutiny, so long as school boards make good faith efforts to assure a court that they are acting for legitimate educational concerns and not simply to

311. *See id.*

312. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (holding that wealth discrimination alone does not require strict scrutiny review); James v. Valtierra, 402 U.S. 137, 142 (1971) (holding that strict scrutiny is not required when a law singles out housing tenants on the basis of their low incomes).

313. *See* JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 299–302 (1966) (documenting relationships between family socioeconomic status and individual educational performance); CHRISTOPHER JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972) (same); ON EQUALITY OF EDUCATIONAL OPPORTUNITY (Frederick Mosteller & Daniel P. Moynihan eds., 1972) (same).

314. *See* MARY M. KENNEDY ET AL., U.S. DEPARTMENT OF EDUCATION, POVERTY, ACHIEVEMENT AND THE DISTRIBUTION OF COMPENSATORY EDUCATION SERVICES 20–22 (1986) (documenting the relationship between high levels of school poverty and lower average school achievement); LAURA LIPPMAN ET AL., URBAN SCHOOLS: THE CHALLENGE OF LOCATION AND POVERTY x–xii (1996) (reporting that both urban location and high school poverty concentration were associated with lower academic performance); UNITED STATES DEPARTMENT OF EDUCATION, PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES v, 73 (1997) (reporting extensive research revealing that "school poverty concentration is associated with lower academic performance"); UNITED STATES DEPARTMENT OF EDUCATION, SCHOOL POVERTY AND ACADEMIC PERFORMANCE: NAEP ACHIEVEMENT IN HIGH-POVERTY SCHOOLS 3–5 (1998) (noting the relationship between high percentages of lower-income children within schools and the lower average academic performance by children in those schools on mathematics and reading achievement tests administered by the National Assessment of Educational Progress).

re-impose racial assignment patterns through a subterfuge. The Wake County board appears to be charting a defensible course that other school districts would be wise to examine.[315]

CONCLUSION

The Fourth Circuit has predicted that if school boards are permitted to engage in race-conscious school assignments, school children might somehow learn from these educational choices to view their classmates solely in racial terms and not as individuals. Allow me a contrary prediction. It is far more likely that if willing school boards cannot assign students by race or ethnicity, we risk a rapid return to a time when each school child could, and did, identify "white schools" and "black schools" simply by reference to the predominant race of the children attending them. Far more certainly than school boards' good-faith efforts to assure of educational diversity, this de facto resegregation of our schools will re-create the conditions condemned in *Brown* in 1954.[316]

I grew up in such a time. It worked a terrible evil. Although I cannot speak for my African-American neighbors, since segregation foreclosed my opportunity ever to know them, it was a psychologically damaging and educationally destructive experience for my white friends and myself and, I venture, for millions of other children. It has taken literally decades for my generation to begin to shed the unconscious, but pernicious, grip of the segregated environments in which we were brought up, with all of the fears, suspicions, and misunderstanding that they created.[317] It has also

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315. *See generally* Bower, *supra* note 18, at 2038 (asserting that "Wake County's decision to replace explicit considerations of race with race-neutral alternatives allows the plan to avoid the constitutional infirmity identified in *Capacchione*, *Tuttle*, and *Eisenberg*").

316. Chief Judge Wilkinson has acknowledged the crucial role served by public schools in fostering a multiracial society:

> The values of *Brown* are most poignantly implicated [in education], because society has traditionally relied upon public schools to lay the bedrock for integration. Elementary and secondary schools were not only designed to prepare students for the challenges and opportunities of American life; they were also meant to serve as melting pots where interracial friendship could counteract prejudice at an early age. Separatist educational arrangements threaten both of these traditional goals.

J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 1018–19 (1995) (footnote omitted).

317. *See generally* WILLIE MORRIS, YAZOO: INTEGRATION IN A DEEP SOUTHERN TOWN 27 (1971) (expressing the hope that "[t]his generation of children, white and black, in Yazoo will not, I sense, be so isolated as mine, for they will be confronted quite early with the things it took me years to learn, or that I have not learned at all").

taken decades of extraordinary dedication by the generation who dismantled that twisted system—black and white, lawyers and lay people, school principals, teachers, activists and simple, decent parents—all of whom fought, many at great sacrifice, to overcome centuries of enforced segregation and to replace it with something finer, something truer to the deepest promises of the American system.[318]

It is more than a mistake—it is a tragedy—when with so little genuine debate, with such an absence of serious reflection upon either the profound costs or the dubious benefits of their decision, federal courts, in the name of abstract "colorblindness," now enjoin school boards from bringing together school children across the stubborn remnants of our national color line. This substitution of federal judicial will for the judgment of local public officials, who are daily responsible for the education of our children in cities and towns throughout the Fourth Circuit, will, I fear, do grave and permanent damage to the sensibilities and social development of a whole new generation of American students.

I can find no more apt words with which to close than those written in 1896 by the first Justice Harlan: "The destinies of the two races, in this country, are indissolubly linked together, and the interest of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."[319] Though more than two races share our national life in the year 2000, their destinies are no less "indissolubly linked together" than when Justice Harlan penned his famous dissent. While the believers in the new racial piety cite Justice Harlan's declaration from this selfsame dissent that "[o]ur Constitution is color-blind"[320] in support of their faith, Justice Harlan would neither have recognized nor approved the use to which they have put his admonition. Justice Harlan's deepest concern, as he made clear, was to resist government action that would "create and perpetuate a feeling of distrust between

318. Chief Justice Wilkinson has assured readers that today's federal judges "are aware of the extraordinary role their predecessors played in promoting a unified view of American citizenship," and appreciate the "small acts of personal courage and perseverance on the order of that found at Valley Forge" that characterized the struggles of black people "toward the integrative ideal." Wilkinson, *supra* note 316, at 996. The ultimate resolution of the underlying issues in *Tuttle*, *Eisenberg*, and *Capacchione* will surely test the devotion of present judges to the vision and courage of their extraordinary predecessors.

319. Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

320. *Id.* at 559 (Harlan, J., dissenting).

these races,"[321] that would permit "[t]he arbitrary separation of citizens, on the basis of race."[322] Under the conditions prevailing in Arlington County, Virginia, Montgomery County, Maryland, and Mecklenburg County, North Carolina, in the year 2000, it is the three decisions recently rendered within the Fourth Circuit that most clearly invite the "arbitrary separation" and most certainly risk the "distrust between the races" that John Marshall Harlan wrote to lament and condemn a century ago.

321. *Id.* at 560 (Harlan, J., dissenting).
322. *Id.* at 562 (Harlan, J., dissenting).